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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. ~~840~~ 100

ANDREW J. MAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND MOTION TO DISPENSE WITH PRINTING OF RECORD.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

ANDREW J. MAY,

vs. *Petitioner,*

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner, Andrew J. May, respectfully prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit entered January 24, 1949, affirming the judgment of the District Court of the United States for the District of Columbia (now the United States District Court for the District of Columbia) on the verdict of a jury finding petitioner guilty on three Counts of an Indictment charging petitioner conspired to commit offenses against the United States, that is, to violate 18 U. S. C. 203, and to defraud the United States, and with two substantive violations of 18 U. S. C. 203.

The Opinion Below

The District Court of the United States for the District of Columbia filed no opinion. The Opinion of the United States Court of Appeals for the District of Columbia Circuit was entered on January 24, 1949 and is not yet reported (R. 7612).[1]

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 24, 1949 (R. 7612-7614). On February 7, 1949 the time for filing Petition for Rehearing was extended to February 28, 1949. On February 26, 1949, Petition for Rehearing of Andrew J. May was filed (R. 7642). This Petition for Rehearing was considered and denied by the United States Court of Appeals on April 6, 1949 (R. 7711). The time for filing Petition for Writ of Certiorari was extended by this Court on April 20, 1949 to and including June 4, 1949. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 347).

Summary Statement

This case presents for correction errors of the District Court of the United States for the District of Columbia, erroneously affirmed by the United States Court of Appeals for the District of Columbia Circuit. The case is one of importance and presents questions which should be decided by this Court in the public interest.

The indictment was returned January 3, 1947 (R. 7377) and contains four Counts. Count I charges that Petitioner and three other persons conspired together to commit offenses

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[1] R. refers to the record on appeal filed by the Clerk of the United States Court of Appeals for the District of Columbia Circuit with this Court.

R. 7612-7711 as printed in this Court are renumbered R. 159 et seq. The Indictment, pleadings, et cetera appear in the Appendix numbered in this Court as R. 1-158. Instructions to Jury are printed in Appendix to this Petition.

against the United States, that is, to violate 18 U. S. C. 203, and to defraud the United States, in that petitioner, Andrew J. May, a member of Congress, received and agreed to receive directly and indirectly compensation for services rendered and to be rendered two corporations, Erie Basin Metal Products, Inc. and Batavia Metal Products, Inc., and to the other defendants named in the indictment, Henry M. Garsson, Murray W. Garsson and Joseph F. Freeman, in relation to matters in which the United States, through the War Department, was directly and indirectly interested, in violation of 18 U. S. C. 88 (R. 7377). Count II charged petitioner did receive directly and indirectly compensation for services rendered and to be rendered the Erie Basin Metal Products, Inc. and Henry M. Garsson, Murray W. Garsson and Joseph F. Freeman, in the sum of $5,000 on August 22, 1944. The other persons named in the indictment were made defendants as aiders and abettors, all in violation of 18 U. S. C. 203 (R. 7389). Count III charged the same offense as Count II, except that the compensation was described, not as money, but as a check of Erie Basin Metal Products, Inc. for $5,000 (R. 7391). Count IV charged an agreement by petitioner to receive compensation in the amount of $15,477.60 from Batavia Metals Products, Inc. and $38,156.47 from Erie Basin Metal Products, Inc. in return for services. Henry M. Garsson, Murray W. Garsson and Joseph F. Freeman were made defendants as aiders and abettors (R. 7392). Petitioner was arraigned and pleaded not guilty on January 24, 1947 (R. 7394). Petitioner's Motions to Dismiss the Indictment, to Strike and for Leave to Inspect the Grand Jury Minutes filed February 7, 1947 (R. 7396) and his Motion to Suppress Evidence filed April 1, 1947, were overruled on April 18, 1947 (R. 7490). Trial was had before a Jury beginning on July 3, 1947. Petitioner's Motions to Strike Evidence and for Acquittal

were overruled at the close of the Government's case and at the close of the evidence. A verdict of not guilty on all Counts of the indictment was directed at the close of the Government's case as to Joseph F. Freeman. Petitioner's Motion for Acquittal was granted as to Count II, the prosecution having elected to stand upon Count III. There was a verdict of guilty against petitioner and the remaining defendants on Counts I, III and IV. Petitioner's Motions for Judgment of Acquittal, in Arrest and for a New Trial, and his Supplemental Motion for Examination of Jurors and for a New Trial were argued and denied (R. 7574-7586).

On July 25, 1947 petitioner was sentenced to imprisonment for eight months to two years, to run concurrently on each Count. Similar sentences were imposed upon the remaining defendants. All defendants were granted bond pending appeal. All defendants duly filed bonds of appeal. Petitioner and the convicted defendants appealed from the judgment of conviction.

On January 24, 1949 the United States Court of Appeals for the District of Columbia Circuit filed its Opinion, in which Justices Edgerton and Prettyman concurred to affirm the judgment of conviction. Chief Justice Stephens dissented, holding that the conviction could not properly stand as to petitioner May or as to the other defendants, Murray W. Garsson and Henry M. Garsson. Petition for Rehearing was duly filed and denied by the United States Court of Appeals. This Court extended the time for the filing of Petition for Writ of Certiorari to and including June 4, 1949.

The indictment charged that petitioner was a member of the House of Representatives of the United States, representing the Seventh Congressional District of Kentucky, and Chairman of the Committee on Military Affairs of the House (R. 7377). The indictment charged that Henry M.

Garsson was a director, officer and stockholder of Erie Basin Metal Products, Inc. and Batavia Metal Products, Inc., corporations engaged in the production of war materials (R. 7377). Defendants, Murray W. Garsson and Joseph F. Freeman, were described as employees and agents of the named corporations (R. 7377).

As we have pointed out, the indictment contained four Counts. Count I charged a conspiracy to commit offenses against the United States, to violate 18 U. S. C. 203 and to defraud the United States of its Governmental functions. It charged that payments were made to petitioner in exchange for services and that a corporation was organized known as the Cumberland Lumber Company to conceal such payments. It charged that petitioner was the owner of the Cumberland Lumber Company. Thirty-five overt acts are alleged in the indictment. The conspiracy is alleged to have commenced on January 1, 1942 and continued until December 31, 1946 (R. 7377).

Count II charged the payment of $5,000 to petitioner as compensation for services rendered and named the Garssons and Freeman as aiders and abettors.

Count III charged substantially the same offense as Count II, except in lieu of charging a money payment of $5,000, this payment is charged in the form of a $5,000 check. As in Count II, the Garssons and Freeman are named as aiders and abettors.

Count IV charged an agreement to receive directly and indirectly specified sums from Erie Basin Metal Products, Inc. and Batavia Metal Products, Inc. as compensation for services, and named the Garssons and Freeman as aiders and abettors.

It was contended in the District Court that the conspiracy statute, 18 U. S. C. 88, embraced two offenses—(1) a conspiracy to commit an offense against the United States,

and (2) a conspiracy to defraud the United States—which should be kept separate in any indictment drawn under this section. The indictment admittedly charged that defendants conspired to commit *offenses* against the United States, that is, to violate 18 U. S. C. 203 and to defraud the United States. These two separate offenses, under the decisions, could not be included in a single Count in the indictment. Such practice is also forbidden by Rule 8(a) of the Rules of Criminal Procedure, and by 18 U. S. C. 557 (R. 7124).

Counts III and IV of the indictment were fatally defective, as they named Henry M. Garsson, Murray W. Garsson and Joseph F. Freeman as aiders and abettors on the theory that they agreed to pay the compensation described in these Counts of the indictment. It is also contended that if the agreement to pay compensation violated the statute, it would be a separate offense from the agreement to receive, and an indictment could not charge in one act both the agreement to receive and the agreement to pay compensation (R. 7155).

Petitioner, while a Congressman and while Chairman of the House Military Affairs Committee testified before the Senate War Investigating Committee concerning the matters and things set forth in all Counts of the indictment. He furnished as part of his testimony vouchers, checks, papers, letters and papers relating to the matters and things described in the indictment, and particularly to the Cumberland Lumber Company and its operations. The giving of this testimony and the fact that it did relate to the matters and things set forth in the indictment gave petitioner immunity from any criminal prosecution involving such testimony and evidence except for perjury. R. S. 859, 28 U. S. C. 634 and the Fifth Amendment to the Constitution. The prosecution used the testimony and evidence obtained by the Senate Committee from Congressman May

in violation of the statute and the Constitution. Having obtained immunity, the prosecution was precluded from bringing the present indictment against petitioner and it should have been dismissed (R. 7146).

Petitioner also moved for the right to inspect the Grand Jury minutes on the ground that such inspection would show that matters occurring before the Grand Jury warranted the dismissal of the indictment. This on the theory that illegal and improper evidence was used before the Grand Jury to obtain the present indictment in violation of 28 U. S. C. 634 and the Fifth Amendment (R. 7098, 7399).

Petitioner also moved to suppress evidence relating to the matters and things set forth in the indictment on the ground that 28 U. S. C. 634 forbids the use of such evidence in any criminal proceeding involving petitioner because he had testified concerning the same before a Committee of the Senate of the United States, and on the further ground that leads were furnished in petitioner's testimony from which facts being used by the prosecution were derived. A supporting Affidavit was filed with this Motion, the allegations of which were never denied by the prosecution (R. 7471).

The District Court overruled all of petitioner's Motions and similar Motions filed on behalf of the other defendants, impaneled a Jury and commenced the trial. (R. 7490 and 7492.) The prosecution offered evidence out of order which was objected to by the petitioner on the ground that it was generally incompetent, irrelevant, immaterial, hearsay and certainly was not admissible under the conspiracy Count, for the reason that no proof aliunde existed to establish the conspiracy and petitioner's connection therewith (R. 187). The District Court, without requiring the prosecution to establish the existence of the conspiracy and of petitioner's connection therewith, received all evidence offered by the prosecution, including hearsay evidence relating to

the thirty-five overt acts, and to other alleged overt acts, provisionally and on the assurance of the prosecution that this evidence would be properly connected up by proof establishing the existence of the conspiracy charged in Count I and the substantive offenses stated in Counts III, IV and V.

Petitioner, before evidence was received pertaining to the matters and things about which he testified before the Senate Committee, moved during the trial to suppress all evidence pertaining to this testimony the ground that 28 U. S. C. 634 at the very least forbids the use of such evidence. The District Court overruled this Motion, imposed no restriction upon the prosecution in the use of this evidence and permitted the use of the very letters, checks and vouchers which the Committee obtained from petitioner during his testimony and from leads furnished by his testimony before the Committee. In fact, practically all of the prosecution's evidence was obtained from the Committee and respondent's exhibits showed this fact on their face by the notations thereon of the Senate Committee (R. 204).

At the conclusion of the prosecution's case, petitioner moved for judgment of acquittal. Petitioner also moved to strike each and every exhibit provisionally received in the record and the testimony of each witness who testified for the prosecution. The Court denied these Motions and similar Motions by the other defendants, except the Motion for Judgment of Acquittal of Freeman. The District Court granted Freeman's Motion for Judgment of Acquittal and directed a judgment of acquittal in his favor, on all Counts of the indictment (R. 7499, 2588).

In view of the acquittal of Freeman, petitioner and the other defendants moved to strike all the evidence in the case relating to the activities and statements of Freeman as being incompetent, irrelevant, immaterial and hearsay.

These motions were denied and the court permitted all the testimony concerning Freeman to stand and to be considered as evidence against the remaining defendants under all counts. (R. 2881.)

At the close of the evidence, petitioner and the remaining defendants renewed their Motions to Strike all exhibits and testimony provisionally received and renewed their Motions for Judgments of Acquittal. The trial court granted each of defendants' Motions for Judgments of Acquittal on Count II of the indictment and overruled their Motions to Strike and for Judgment of Acquittal on Counts I, III and IV (R. 7499).

On July 3, 1947, the Jury returned a verdict finding petitioner, Henry M. Garsson and Murray W. Garsson guilty on Counts I, III and IV.

Petitioner's Motion for Judgment of Acquittal, Arrest of Judgment and for a New Trial were denied. Petitioner's Supplemental Motion for a New Trial and for Examination of the Jurors was overruled. On July 25, 1947, petitioner and Henry M. Garsson and Murray W. Garsson were each sentenced to imprisonment for eight months to two years, to run concurrently. All were permitted to remain on bond pending appeal. All appealed. The Court of Appeals, by a divided court, affirmed with "doubt" the judgments of conviction.

We assert that each and every item of testimony in this case was received provisionally, over petitioner's objections, and should not have been received because the prosecution never established the basic charges in the indictment. Not one single meeting of the defendants was shown. Nor were circumstances shown under which the defendants could have had a meeting of the minds on a conspiracy or for the purpose of entering the agreements charged in Courts III and IV.

The great bulk of the prosecution's testimony and exhibits related to the so-called overt acts and things done in pursuance of the conspiracy charged in Count I. The prosecution never proved by competent evidence the existence of any such conspiracy, therefore this evidence pertaining to overt acts was inadmissible hearsay and should have been stricken from the record. It should never have been received in the first instance.

Insofar as the evidence pertaining to Count III of the indictment is concerned, which related to the alleged payment of $5,000 by check to the petitioner, we state categorically that the evidence failed to sustain the charge that this check was compensation. The undisputed facts concerning this check were that it was drawn by Erie Basin Metal Products, Inc. payable to Murray W. Garsson. As the Cumberland Lumber Company, which had no contracts with the Government and was owned by Dr. Garsson, at that time was in need of funds, and as Congressman May was acting without compensation as a disbursing agent and service of process agent for this company, Murray W. Garsson agreed to permit $4,000 of this check to be used for Cumberland Lumber Company purposes. Pursuant to this arrangement, Congressman May deposited $4,000 of this $5,000 check in his personal account at the National Bank of Washington, and delivered $1,000 of the check to Mr. Freeman for delivery to Mr. Garsson. Mr. May (R. 2674) testified he gave the money to Mr. Freeman who also testified (R. 6009) to this fact and that he (Freeman) gave the $1,000 to Murray W. Garsson. The $4,000 placed in Congressman's May's personal account was disbursed to pay a land note in the amount of $2606 of the Cumberland Lumber Company on the day of deposit, August 22, 1944, and to reimburse Congressman May for personal funds previously advanced by him for the benefit of the Cumber-

land Lumber Company (R. 2673-2687; Def. Ex. 202). On August 24, $1300, the balance of a legal fee owed an attorney by the name of Al Levin, was paid by Congressman May through Freeman (R. 2685). Mr. Freeman testified he obtained this $1300 from petitioner and paid it to Mr. Levin (R. 6010). The balance remaining of the $4,000 advanced by Murray W. Garsson for the use of the Cumberland Lumber Company in the sum of $94 was accounted for under itemized disbursements for the benefit of the Cumberland Lumber Company (R. 2721; Def. Ex. 114). Undisputed vouchers support this exhibit (R. 2696; Def. Exs. 117, through 183).

Moreover the receipt of $4,000 of this $5,000 check was testified to by Congressman May before the Senate Committee, which was told by him that this sum of $4,000 was deposited in his personal account and was disbursed for the account of the Cumberland Lumber Co. For this reason, the evidence relating to this transaction could not be used to support Count III, because of the prohibitions of 28 U. S. C. 634. There was no evidence to support Count III which charged that the $5,000 check was received by petitioner as compensation. The uncontradicted evidence was to the contrary. Thus, no question was posed for the jury.

There was no substantial evidence to support the allegations of Count IV. Count IV involves an alleged agreement on the part of petitioner with the other defendants to receive two specific sums as compensation—$15,477.60 from Batavia Metal Products, Inc. and $38,156.47 from Erie Basin Metal Products, Inc. There was no direct evidence of any agreement of this nature nor was there any substantial evidence from which any such agreement could be found. There was disbursed through petitioner the total sum of $33,728.07, which disbursements were not contradicted, including the $5,000 described in Count III for the Cumber-

land Lumber Company. No other sums were paid to petitioner and there was no evidence that any further sums were agreed to be paid to petitioner for the account of the Cumberland Lumber Company or for any account.

The amounts received by petitioner are set out in detail in defendants' Exhibit 114 (R. 2721) and they correspond with the deposits made to the various accounts of petitioner shown in the Government's evidence (R. 3677, 2689). Detailed, itemized and uncontradicted statements of the disbursements of these funds are shown by defendants' Exhibit 114 (R. 2721), and in all their detail are covered by the testimony of Congressman May and other witnesses (R. 2696). Vouchers, including the payroll book of the Cumberland Lumber Company support Congressman May's uncontradicted statement of account. As the disbursement of these funds was not contradicted, we are unable to understand how this evidence can be used as a basis for establishing an agreement on the part of petitioner to receive these sums as compensation.

Certainly the borrowings of Henry M. Garsson and Murray W. Garsson about which petitioner was wholly uninformed do not support this charge. The only portions of the money borrowed by Henry M. Garsson and Murray W. Garsson from the corporations named in the indictment which were disbursed by petitioner is the sum of $28,634.07, excluding the $5,000 transaction charged in Count III.

There is not one scintilla of evidence to show that the borrowings of Henry M. Garsson and Murray W. Garsson, concerning which petitioner was wholly uninformed, in the amount of $5,000 each, ever went further than their personal accounts. Moreover, it was conceded by the prosecution that Henry M. Garsson paid the initial $10,000 for the purchase of the timber land subsequently conveyed to the Cumberland Lumber Company, directly to the Mineral

Development Company, the original owner, and no portion of this payment was disbursed through petitioner.

Count IV charges total receipts of $53,634.07. After deducting the above mentioned $20,000 which the uncontradicted evidence shows petitioner never received, handled or disbursed, the balance of $33,634.07 is accounted for—every cent of it. Thus, the evidence failed wholly to support the charge contained in Count IV.

The facts as they were developed by the evidence in this case as they pertain to petitioner are these:

Petitioner met Freeman through Senator McAdoo. Years later Freeman renewed his acquaintance with petitioner. Petitioner next saw Freeman early in 1941. Two years later Freeman came to petitioner and discussed the procuring of a considerable quantity of lumber. Petitioner suggested the name of a Lumber Company in Ohio which had saw mills in Kentucky and West Virginia. Petitioner also informed Freeman that in his District there was a rather large tract of rough mountain land well timbered for sale. Freeman stated he would talk to his principals and let petitioner know whether they were interested (R. 2444). Later Freeman telephoned concerning the purchase of the timber land in Kentucky, stating his principals might be interested if timber could be gotten from the tract for current war contracts (R. 2444). Petitioner having planned already to go to Kentucky, told Freeman he would look into the matter and ascertain whether this land could be acquired. One Fields, an attorney engaged in various enterprises in Kentucky, informed petitioner he represented the owner of the tract —Mineral Development Company. Fields said he would advise the Company and ask it to communicate with petitioner directly, which the Company later did. Early in 1943 an option on the tract comprising 2104.44 acres of land, was obtained by petitioner with the right to assign the op-

tion to the persons actually purchasing the land. In May, 1943, petitioner gave the written option to Freeman or Mr. Garsson. The option called for a purchase price of $21,044.40 (R. 2716).

The land was to be acquired in the name of a corporation which was to be organized by Henry M. Garsson, who was to be its owner. In June 1943 Levin, an attorney acting under instructions of Henry M. Garsson, through the Corporation Trust Company incorporated the Cumberland Lumber Company under the laws of Delaware. The records of the company and the records of the Corporation Trust Company showed Henry M. Garsson as President and L. E. Gray, L. H. Herman and S. N. Brown as the original directors. These records also showed the later change which occurred in the membership of the Board. At no time was petitioner an officer and director of the corporation. The stock records of the corporation, which were received in evidence, showed that all authorized stock was in the name of Henry M. Garsson (R. 3715, 5103).

Petitioner testified that in assisting in this matter and in securing the option, he was prompted by a sincere desire to aid all parties, both seller and buyer, to create a timber industry in his District, to secure lumber for war purposes and that he did not act for monetary gain and that he did not receive compensation for anything he did in this matter (R. 2474, 2957).

On July 30, 1943, after title to the land had been searched, the Cumberland Lumber Company took an assignment of the option and the title to the land and timber was conveyed by the Mineral Development Company to the Cumberland Lumber Company. Fields recorded this deed among the land records of Letcher County, Kentucky (R. 1871, 3742).

The purchase price of $21,044.40 was represented by cash and notes. The deposit provided for in the option of

$1,000 was mailed by petitioner to the Mineral Development Company. This sum represented an advance made by Murray W. Garsson which was repaid to him later when funds were made available by Henry M. Garsson. The balance of the cash portion of the option price was paid by Dr. Garsson direct to the Mineral Development Company. Petitioner had nothing to do with this aspect of the transaction. The purchase money notes totalling $10,000 were all dated July 30, 1943 and were signed in the name of the Cumberland Lumber Company by Henry M. Garsson, its President (R. 3693, 2546). The new owner was anxious to get started in the production of lumber but was unfamiliar with the type of business and the locality where the tract was situated. Dr. Garsson asked petitioner to find some one to buy a saw mill, manage the cutting and logging of timber and take over the supervision of the business. Petitioner had lived in a timber country and had had some experience in the lumber business. In an effort to help, after securing the consent of Dr. Garsson, petitioner asked Fields to take over this matter of supervision. Fields accepted and undertook the job (R. 2490).

Petitioner realized that a new corporation, particularly a corporation owned by a Jew, would have difficulty in obtaining local help and cooperation. Such a situation petitioner honestly believed would make the labor problems of the company acute if not impossible, as he knew the experience of other foreign corporations attempting to operate under similar circumstances in that general community. Petitioner's testimony shows that another non-resident operating in the same community was forced to abandon part of its property and to leave the State because of labor difficulties (R. 2558). Accordingly, petitioner, in certain instances left the impression through the community that he was interested in and even stated at times that he was the

owner of the land, in order to obtain the cooperation of the local inhabitants and to obtain labor to work the tract. The record is clear that petitioner was not in fact the owner of the land and the title was recorded in the name of the Cumberland Lumber Company (Def. Exs. 13, 16, 21, 22, 56, 57, 60, 61, 87). This situation illustrates how an honest effort to assist others can be twisted by inference to the prejudice of the parties concerned. Such statements do not establish the allegations of the indictment and are not sufficient to support the charges.

As the tract of land was owned by a Delaware corporation, it was necessary under the laws of Kentucky to appoint a local agent for service of process within that State. Levin asked petitioner to recommend some one in Kentucky to act in this capacity. Petitioner suggested the names of several persons but none of these were satisfactory to Levin. Later, Levin asked petitioner to permit his name to be used as process agent for the corporation. Petitioner consented to this and he was named as process agent in the State of Kentucky, being a resident of that State. Had petitioner been an officer of the corporation, it would have been unnecessary to have named him as process agent under Kentucky law (R. 1122, 2490).

A mill was needed for use on the tract. On the recommendation of petitioner, one was purchased from the Frick Company. Payments of the notes executed by the Cumberland Lumber Company for the purchase of this mill were made through petitioner by Dr. Garsson (R. 2453, 2461, 2709).

Fields encountered many difficulties in operating the tract. Manpower shortage was at its worst. The tract was mountainous and most of the timber stood on the uplands. Fields made the mistake of building a log chute down one of the ravines costing thousand of dollars, which chute was a

total loss. He was unable to secure tractors, skidders and other needed equipment. Over the months of Fields' management, no progress was made and practically no timber was produced. This necessitated constant investments of further capital by Dr. Garsson. Eventually petitioner discharged Fields because of his failure to successfully supervise the timber operations on the tract (R. 2459). This discharge of Fields by petitioner was one of the things that colored his testimony against petitioner, coupled with the fact that over the years Fields had been very much interested in acquiring this tract for himself. Failure of his plans and his failure as a manager must be taken into account in evaluating the testimony of this prejudiced witness (R. 2497).

After Fields was discharged, for a short time one of petitioner's sons, A. J. May, Jr., worked on the tract and produced some lumber. Unfortunately, petitioner's son, after undertaking this work, died after a short time and a new manager was recommended, one A. C. Brown, who was said to have had lumber experience. Brown took over the management of the tract in 1945. He proceeded to cut timber and sell it to various persons. Though demands were made upon him for an accounting, he constantly refused to account for the timber sold by him. He refused to make his books available to an accountant sent to examine them by petitioner. Brown also sold lumber without the company's knowledge and then commenced to secret the funds derived therefrom by depositing them in bank in his wife's name. In addition, Brown misinformed petitioner concerning the sources of funds for the purchase of horses to be used on the tract. Brown informed appellant that the horses were paid for from his (Brown) funds and were his property and insisted upon repayment of the purchase price. It developed when Brown testified under oath at the trial that this

was not true and that Brown had purchased these horses with funds of the company. Upon discovering these defalcations of Brown, the Cumberland Lumber Company, through J. W. Howard, an attorney known to petitioner, sued Brown in the United States District Court at Pikeville (T. 2624, 2628). The Complaint was verified by Henry M. Garsson as President of the Cumberland Lumber Company. Brown did not answer. Instead, negotiations for settlement were opened which resulted in Brown agreeing to pay $40,000 to cover the purchase of the property and the equipment located thereon. This offer was submitted to Henry M. Garsson and accepted. Brown eventually paid by check the sum of $40,000. This check was mailed to Henry M. Garsson by petitioner. Garsson deposited this check in the name of the Cumberland Lumber Company, and after deduction of certain expenses repaid loans which had been obtained by him and his brother, Murray W. Garsson, from the Erie and Batavia Companies for the purpose of financing the timber venture (R. 3763, 2513, 2628).

These facts occurred long before there was any indication that the Senate War Investigating Committee was interested in any way in investigating the situation, particularly as it concerned Cumberland Lumber Company. During the time when Fields operated the mill, Dr. Garsson furnished checks covering the cost of the operation. Disbursement of these are all shown on the statement of account of petitioner (Def. Ex. 114; R. 3054).

Five means were used by petitioner to disburse funds on behalf of the Cumberland Lumber Company—by cash; by Cumberland Lumber Company account in Prestonsburg, Kentucky; by petitioner's personal accounts in Prestonsburg, Kentucky, in Washington, D. C. and by the Sergeant at Arms of the House of Representatives. Petitioner did not and could not make all disbursements from a single fund.

Many times accounts were overdue and in order to keep current and avoid embarrassment, petitioner paid them out of his own funds. Checks which were mailed by Henry M. Garsson to defray costs were mailed by petitioner to Prestonsburg, Kentucky for deposit to the Cumberland Lumber Company, and on several occasions were erroneously deposited by the teller to petitioner's personal account. All of this was immaterial, however, because every penny of the funds received by petitioner is accounted for and is shown to have been used for the Cumberland Lumber Company (R. 2167-2742). A day by day reconciliation between the various accounts was received in evidence and shows the actual disbursement of all funds received by petitioner for the account of the Cumberland Lumber Company. On final audit of the accounts, petitioner is shown to have in his possession $490.60, which he is holding to apply on accounts payable. Insofar as the accounts payable are concerned, the record shows the Cumberland Lumber Company is indebted to one Mayo in the amount of $1,000 for a truck purchased on its account, and the company has a contingent liability claim in excess of $2,000 growing out of the death of one Elbert Willis, a workman who was killed during employment. Since this small sum of $490.60 was in petitioner's possession to be used to pay accounts payable of the Cumberland Lumber Company when the investigation of the Senate Investigating Committee got under way, petitioner on advice of counsel has retained it so that the situation would remain unchanged until this litigation is over (R. 2716, 2639). Petitioner never received compensation or anything of value whatever for any services rendered any of the defendants or corporations named in the indictment (R. 2492, 2742).

Mention was made in the evidence of the telephone conversations had between petitioner and certain officials of the War Department which involved matters in which Bata-

via Metal Products, Inc. and Erie Basin Metal Products, Inc. were interested. Petitioner's position as Chairman of the House Military Affairs Committee had a direct connection with the war effort. In fact, this Committee was designated to investigate the entire war effort and many related matters (R. 2526, 2732). Petitioner's position made him a target for any individual or company desiring assistance in the war effort. Covering a period of five years described in the indictment, there was received through the eleven telephones in petitioner's office 9,000 to 15,000 telephone calls per month, besides numerous letters and callers (R. 2352, 3568). The evidence showed that 22 telephone calls were made by May over the period of five years in connection with the 35 overt acts described in the indictment. It is probable that less than 22 separate calls were made, as several calls were made pertaining to one matter. Nevertheless, assuming that 22 were made in the five years covered by the indictment, that would be at the rate of 4 plus calls per year—an infinite fraction of the 9,000 to 15,000 calls per month that came through petitioner's office.

At the time the calls were made, petitioner knew that munitions were badly needed. Further, he had been informed by the War Department that the two named companies were producing essential types of ammunition efficiently and were two of the best producers of war materials in the war effort. Accordingly, petitioner was impelled to make every effort to prevent discrimination against them and to speed up the war effort. Petitioner's calls were made for this purpose.

The prosecution conceded and the Court below held that every telephone call petitioner made and every letter petitioner wrote were legal and not improper. It is conceded and the Trial Court held that there was no impropriety in what Congressman May did in his dealings with the War

Department. Thus, it is clear that petitioner's only interest was in seeing to it that these contractors received fair treatment and that the production of war goods and supplies was not retarded but was materially expedited. Offers of proof made to corroborate and support petitioner's motives and reason for making the telephone calls in question and writing the letters described in the evidence were rejected by the Trial Court, and the Trial Court refused petitioner the right to corroborate his testimony describing his reasons and motives for doing the things he did. The evidence further showed that petitioner had no interest whatever in the two corporations mentioned, owned no stock therein and received no compensation from them for any services rendered (R. 2491, 2493). We say that these facts are wholly insufficient to support a conviction. Moreover, we say that it certainly was erroneous for the Trial Court to permit the Jury to use all of the evidence provisionally received under Count I of the indictment, a conspiracy Count, as a basis for finding petitioner guilty on Counts III and IV, which allege substantive offenses.

Questions Presented

I

Whether a witness who testified before a Congressional Committee is entitled to immunity from prosecution as to the matters and things described in said testimony because of the provisions of R. S. 102, 2 U. S. C. 192; R. S. 859, 28 U. S. C. 634 and the Fifth Amendment to the Constitution. We say that this question has been decided erroneously, contrary to the plain language of the statute and contrary to applicable decisions of this Court. This question is one of substance relating to the construction and application of two statutes of the United States and the Constitution, which has not been but should be settled by this Court.

II

If immunity is not conferred by R. S. 859, 28 U. S. C. 634, may the testimony of a witness before a Committee of the Senate be used as evidence in a criminal proceeding against the witness in prosecutions involving this testimony? The Courts below have decided that notwithstanding the prohibitions of R. S. 859, such testimony may be used before the Grand Jury and in a criminal trial on conspiracy charges and charges of violation of 18 U. S. C. 203. We say these decisions are contrary to the express language of the statute and are in conflict with applicable decisions of this Court. This question is one of substance relating to the construction of a statute and the Constitution of the United States which has not been but which should be settled promptly by this Court.

III

Whether petitioner, a Congressman, and others, may validly be charged in a single Count of an indictment with a conspiracy to commit offenses against the United States, that is, to receive money as compensation in violation of 18 U. S. C. 203, and to defraud the United States, which is another crime under 18 U. S. C. 88. We say such an indictment is duplicitous and bad because it charges two separate offenses in violation of Rule 8(a) of the Federal Rules of Criminal Procedure. This is a question of importance that has not been and should be settled by this Court.

IV

Whether petitioner, a Congressman, can be indicted with two or more persons and charged with the substantive crime defined in 18 U. S. C. 203 on the theory that such persons have paid or agreed to pay compensation to petitioner and that such persons thereby become aiders and abettors. In

other words, whether 18 U. S. C. 203, which prohibits a Congressman only upon receiving or agreeing to receive compensation for services can be extended to include the payors or the persons who agreed to pay the compensation as aiders and abettors and, therefore, as principals to the offense, in a single Count. We say such an indictment is defective and void, as the persons alleged to have given or agreed to have given such compensation are not parties to any offense under Section 203. An indictment drawn on such a theory is duplicitous, prejudicial and fatally defective.

V

Whether an indictment should be dismissed where more than one-half of the members of the Grand Jury which returned the indictment were Government employees, some of whom were employees of the General Accounting Office, a Department directly affected by the prosecution, where one of the members of the Grand Jury is a practising Government attorney and disqualified to sit as a Juror and when the indictment involves charges of conspiracy to defraud the United States and payments of compensation illegally to a Congressman of the United States, *where no opportunity was afforded to examine the members of such a Grand Jury for actual bias?* This is a question of first impression which has not been but which should be decided by this Court.

VI

Where a conspiracy is charged for the purposes of committing an offense against the United States in violation of Section 203 and to defraud the United States in violation of Section 88, can such a charge be established by proof of overt acts and statements and things allegedly done to effectuate the objects of the conspiracy where there is no independent proof of conspiracy itself and of the connection of

each defendant with such conspiracy? In such a situation, may the Jury be instructed that from the proof of overt acts and statements and things done, all of which are admitted to be legal and proper, find that such a conspiracy exists and that petitioner and his co-defendants are parties thereto? We say that the Trial Court completely ignored basic rules of evidence controlling conspiracy cases as laid down in the decisions of this Court and instructed the Jury to convict petitioner and his co-defendants on such proof without requiring the conspiracy to be proved by independent evidence and the connection of each defendant therewith by independent evidence. Such a practice constitutes such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

VII

May evidence provisionally received under Count I, a conspiracy Count, including evidence of overt acts, statements and things allegedly done in pursuance of a conspiracy, be used to establish the substantive offenses charged in Counts III and IV? The courts below permitted all of the evidence received in the trial below, including evidence of the 35 overt acts and other acts described in the evidence, to be used to establish the substantive offenses charged in Counts II and III. Such a departure from established procedure requires correction by this Court.

VIII

In prosecutions under 18 U. S. C. 88 and 18 U. S. C. 203, where both the Congressman and the parties accused as conspirators or as aiders and abettors have testified to their motives and intents in doing what they did, did the action of the District Court, which was affirmed by the Court of Appeals, rejecting evidence offered by the parties to cor-

roborate and buttress their testimony of motives and intents deprive the parties of a fair trial, particularly when the Trial Court instructed the Jury that they may believe or disbelieve as the Jury saw fit the undisputed testimony of the parties as to their intents and motives? We say that such a method of procedure is obviously unfair and convictions based thereon should not be permitted to stand.

IX

Whether the Trial Court erred in its instructions to the Jury. Whether it was error to refuse the instructions tendered by petitioner. Whether the many irregular actions of the prosecution during the trial of the case, the misconduct of the Jury and the conduct of the Trial Judge deprived petitioner of a fair and impartial trial.

Specification of Errors to Be Heard

The Courts below erred: (1) In overruling and denying petitioner's Motions to Dismiss the indictment, to Strike Specific Portions of the indictment and to Inspect the Grand Jury Minutes. (2) In denying petitioner's Motion to Suppress Evidence in view of the provisions of R. S. 859, 28 U. S. C. 634 and the 5th Amendment. (3) In admitting evidence offered on behalf of the United States. (4) In permitting evidence offered on behalf of the United States to be first provisionally received and then permitting all evidence in the case to be considered generally against petitioner. (5) In denying the petitioner's written Motions to Strike the Exhibits of the Government and the testimony of the Government witnesses. (6) In denying and refusing petitioner's oral and written offers of proof and in refusing to admit evidence on behalf of the defendants. (7) In restricting the proof offered on behalf of the defendants. (8) In overruling the petitioner's Motion for judgment of

acquittal at the conclusion of the prosecution's case. (9) In giving to the Jury instruction No. 12 requested by the prosecution. (10) In refusing to give to the Jury as instructions certain specific prayers as instructions requested by petitioner. (11) In restricting the arguments of counsel in accordance with the restricted ruling of the Court made during the trial, contrary to the defendants' theories of the case. (12) In overruling the petitioner's Motion for Judgment of Acquittal at the conclusion of all the evidence. (13) In charging the Jury in many respects. (14) In denying Petitioner's Motions for a mistrial and a continuance of the case. (15) In overruling petitioner's Motions for judgment of acquittal, in arrest and for a new trial and his supplemental motion for new trial and examination of the jurors. (16) In generally holding throughout the trial that even though each and every act of the defendants was lawful and was not illegal per se and notwithstanding that defendants testified that their acts were done for lawful purposes and there was no evidence to the contrary, nevertheless it was a question for the Jury to determine whether the acts of the defendants constituted a conspiracy as charged in the indictment or represented payments of compensation to petitioner when there was no evidence that any monies paid to petitioner were for compensation for services rendered and to be rendered. (17) In not requiring the prosecution to carry out the Court's instruction concerning a full and complete opening argument and permitting the prosecution to use its rebuttal time for purposes of an opening statement. (18) In not correcting prejudicial effects of the improper closing argument of the prosecution. (19) In not allowing additional time to counsel to answer the improper arguments made by counsel for the prosecution in the Government's closing argument. (20) In not holding that the verdict was reached under circumstances of prejudice and

ill will in violation of the instructions of the Court and in not setting aside said verdict in the interest of a fair trial and justice. (21) In entering judgment on the verdict and sentencing the petitioner to imprisonment.

Statutes, Constitutional Provision and Rules Involved

R. S. 102, as amended June 22, 1938, c. 594, 52 Stat. 942 (2 U. S. C. A., Section 192) reads as follows:

> "Sec. 192. Refusal of Witness to testify—*Every person* who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before any committee of either House of Congress, willfully makes default, *or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor,* punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." (Italics supplied.)

R. S. 103, as amended June 22, 1938, c. 594, 52 Stat. 942 (2 U. S. C. A., Section 193) reads as follows:

> "Sec. 193. Privilege of witnesses—*No witness is privileged to refuse to testify to any fact,* or to produce any paper, respecting which he shall be examined by any committee of either House, *upon the ground that his testimony to such fact* or his production of such paper *may tend to disgrace him or otherwise render him infamous.*" (Italics supplied.)

R. S. 859, as amended June 22, 1938, c. 594, 52 Stat. 943 (28 U. S. C., 634) reads as follows:

> "Testimony of Witnesses before Congress—*No testimony given* by a witness before any committee of either House, *shall be used as evidence in any criminal proceeding against him* in any court, except in a prose-

cution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege." (Italics supplied.)

R. S. 5440, (18 U. S. C., 88) reads as follows:

> Conspiring to commit offense against United States —If two or more persons conspire *either* to commit any offense against the United States, *or to defraud* the United States in any manner *or* for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both." (Italics supplied.)

R. S. 1782, March 4, 1909, c. 321, Sec. 113, 35 Stat. 1109 (18 U. S. C., 203) reads as follows:

> "*Whoever, being elected or appointed* a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, shall, directly *or* indirectly, receive, *or* agree to receive, any compensation whatever for any services rendered *or* to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, *shall be fined* not more than $10,000 *and imprisoned* not more than two years; and shall moreover, thereafter *be incapable of holding any office of honor, trust, or profit under the Government of the United States.*" (Italics supplied.)

Amendment V of the Constitution of the United States reads as follows:

> "*No person* shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor *shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation." (Italics supplied.)

Rule 8(a) of the Federal Rules of Criminal Procedure, reads as follows:

> "(a) Joinder of Offenses. *Two or more offenses may be charged* in the same indictment or information *in a separate count for each offense* if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." (Italics supplied.)

Rule 30 of the Federal Rules of Criminal Procedure reads as follows:

> "Instructions. * * * The Court shall inform counsel of its proposed action upon the requests *prior to their arguments to the jury,* but the court shall instruct the jury after the arguments are completed * * *." (Italics supplied.)

Reasons for Granting the Writ

Several of the reasons usually advanced for the allowance of a Writ of Certiorari are present in this case. The United States Court of Appeals for the District of Columbia Circuit has rendered a decision "not free from doubt" involving questions of first impression, has decided questions of general importance and questions of substance relating to the construction and application of the Constitution and of

several statutes of the United States which have not been but should be settled by this Court, has not given proper effect to applicable decisions of this Court, has decided Federal questions in a way probably in conflict with applicable decisions of this Court and of other Circuit Courts of Appeal, has so far sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision and correction. The questions presented are novel and of such importance that the public interest will be best served by such questions being decided by this Court.

I

The courts below did not give proper effect to the plain language of the statutes involved, the Constitution and the applicable decisions of this Court when they held that petitioner did not obtain immunity against criminal prosecution because he testified before a Committee of the Senate. Congressman May on June 4, 1946 testified before the Special Committee Investigating the National Defense Program of the Senate. He testified at length. It covers petitioner's acquaintance with his co-defendants, negotiations which ultimately led to the acquisition of the timber lands described in the indictment by the Cumberland Lumber Company, the organization of the company, its financing, the disbursements of funds by Congressman May as the fiscal agent of the company, the stock distribution of the company, its place of incorporation and that petitioner received no compensation whatever for any of the services rendered by him. This testimony was bolstered by the furnishing to the Senate Committee of vouchers, checks, deposit slips and other related papers pertaining to the facts covered by petitioner's testimony. The testimony also covers petitioner's relations with the Cumberland, Erie Basin and Batavia Companies, the $48,000 advanced by these companies for timber,

the correspondence between petitioner and Fields, relations between Congressman May and the War Department concerning war contracts mentioned in the indictment, the award of the Army and Navy E, and in some detail and generally all other matters described in the four Counts of the indictment (R. 3080, Vol. 34, pp. 18489-18502; Record of Mead Committee Hearings).

By giving such testimony, petitioner obtained immunity from prosecution, except for perjury, by virtue of R. S. 859, 28 U. S. C. 634 and the Fifth Amendment. This point was raised by petitioner's Motion to Dismiss (R. 7396); Motions and objections made during the trial; Motion to Suppress Evidence, Motion for Judgment of Acquittal and petitioner's post verdict Motions (R. 7396, 7496, 7562). *Smith* v. *U. S.*, (No. 292, decided May 31, 1949) 9 U. S. Supreme Court Bulletin, 1615, 1623-25; *Counselman* v. *Hitchcock*, 142 U. S. 547, 564, 565; *Glickstein* v. *United States*, 222 U. S. 139, 141; *McGrain* v. *Daugherty*, 273 U. S. 135, 167, 158; *United States* v. *Monia*, 317 U. S. 424; *United States* v. *Armour & Co.*, 142 F. 808.

The Majority Opinion pays lip service to these decisions but argues that the testimony of a witness must be obtained under compulsion and that the immunity must be claimed each time a question is asked a witness. Such a ruling is contrary to the plain language of the statute which states "No testimony *given* by a witness * * * shall be used in any criminal proceeding against him in any court * * *." The statute does not say testimony "compelled to be given" by the witness, or "required to be given" by the witness. The statute uses the word "given." Moreover, the decision conflicts squarely with the ruling of this Court in *United States* v. *Monia*, 317 U. S. 324. This contention was that such a statute should not be construed automatically to grant immunity without a claim of privilege. The United States contended in the *Monia* case exactly what the Court

of Appeals held in the decision below, that is, that the testimony must be compelled after the privilege is claimed. After a careful review of the provisions of the statute involved, which is very similar in language to R. S. 859, this Court concluded that no evidence obtained from the witness could be used against him in a criminal case, and it was unnecessary for the witness to claim his privilege to obtain immunity.

In pointed language this Court made it clear that the case of *Heike* v. *United States,* 227 U. S. 131, did not decide this question as the Court below decided that it did, and that this Court held that to be constitutional such a statute must not only preclude the use of evidence against a witness but must also preclude his prosecution as a result of information gained from his testimony, and that nothing short of absolute immunity will satisfy the constitutional provision against self incrimination. This Court, therefore, concluded that Congress did not intend or by the statute in issue provide that the witness must claim his privilege before immunity attached. As this Court has ruled immunity attaches on the giving of the testimony. *Smith* v. *U. S., supra.*

The questions presented concerning R. S. 859 are of first impression in that this Court has never ruled upon the immunity provisions of R. S. 859. It is a question of great importance and should be settled promptly by this Court in the public interest, *Smith* v. *U. S., supra,* p. 1623.

II

R. S. 859 provides that *no* testimony *given* before a Congressional Committee shall be used in any criminal proceeding against the witness. Assuming for argument that the statute does not confer absolute immunity as we contend, it, nevertheless specifically forbids the use of any testimony *given* by a witness before such a Committee in any subse-

quent criminal proceeding, except for perjury. It is undisputed that Congressman May gave testimony before the Senate Committee. It is undisputed that the indictment covers matters and things described in detail in this testimony. Moreover, it has never been denied that other allegations of the indictment were predicated upon leads furnished in petitioner's testimony. It has never been denied by the prosecution that this testimony was used before the grand jury, or that leads furnished other evidence used before that jury. Accordingly, we submit that these facts may be taken as conceded, particularly as the affidavit setting forth these facts, made a part of petitioner's Motion to Suppress Evidence, has never been denied by the prosecution, and the petitioner was denied the right to take any testimony in support of the statements contained in his Motion and in the affidavit (R. 7469-7470). The decisions of this Court make it clear that such testimony may not be used in subsequent criminal proceedings except for perjury. *Counselman* v. *Hitchcock,* 142 U. S. 547, 564, 565; *Glickstein* v. *United States,* 222 U. S. 139, 141; *McGrain* v. *Daugherty,* 273 U. S. 135, 167, 158; *United States* v. *Monia,* 317 U. S. 424; *United States* v. *Armour & Co.,* 142 F. 808. In view of these decisions, we submit it was improper to permit the testimony of petitioner and such evidence as he furnished to the Senate Committee in the form of checks, letters, vouchers, deposit slips and the like to be used against him in a criminal proceeding pertaining to these matters. The statute specifically forbids the use of such testimony when "given" by the witness. The use of the testimony is a plain violation of the statute and of petitioner's constitutional rights. *Smith* v. *U. S.,* 9 Supreme Court Bulletin 1615, 1630.

The question here presented is one of first impression and important in view of the many proceedings for contempt now pending in the various District Courts to punish wit-

nesses for refusal to answer questions propounded by Congressional Committees. It should be settled promptly by this Court in the interest of the proper administration of justices in this country. *Smith* v. *U. S., supra.*

III

We next contend that Count I of the indictment is duplicitous because it charges more than one offense and thus is invalid under Rule 8(a) of the Federal Rules of Criminal Procedure. In reply to this contention, the Majority Opinion says that neither a multiplicity of objects nor a multiplicity of means converts a single conspiracy into more than one offense. The court below cites the case of *United States* v. *Manton,* 107 F. (2) 834, and concludes:

> "We think the opinion and decision in the *Manton* case established a rule contrary to this contention."

We commend to this Court the detailed discussion of the *Manton* case by Justice Stephens in his Dissenting Opinion. The Chief Justice discusses the *Manton* case and points out clearly that it did not consider whether or not Section 88, Title 18, contemplates two conspiracies, one to commit an offense against the United States and the other to defraud the United States. He points out, the *Manton* decision misinterprets the statute which, like the statute in *United States* v. *Dembowski,* 252 F. 894, is disjunctive in meaning and obviously aims at different evils with different consequences. The *Manton* indictment charged acts which constituted one and the same evil and it was this situation that misled the court in the *Manton* case to think of the indictment as involving one conspiracy rather than two. The instant indictment charges a conspiracy to commit *offenses* against the United States *and* a conspiracy to defraud the United States and the acts involved are not the same. Chief Justice Stephens concluded that the *Manton* case is inappli-

cable to the facts here and that the principle announced in the *Dembowski* case should be followed.

Applying this principle to Section 88, which is in the clear disjunctive, as it uses the words "either • • • or," it is clear that Congress meant that a conspiracy to commit an offense against the United States is a different conspiracy than one to defraud. As Rule 8(a) of the Federal Criminal Rules forbids the joining of more than one offense in one count, the indictment is invalid as the Dissenting Opinion squarely holds. Moreover, the conspiracy count should have been dismissed because Count I is merged in the substantive offenses charged in Counts III and IV.

IV

We contend that the substantive offenses in Counts III and IV involve an agreement of two persons and that it is necessary for such an agreement to exist for the completion of the substantive crime, and that there is no agreement or conspiracy that is not present in the completed crime. Further, the definition of the substantive offense makes criminal *only the receipt* of compensation and *not the payment* of compensation. Therefore, the definition of the offense contained in the statute *excludes* from punishment those who voluntarily participated in the alleged crime, that is, the crime of receiving compensation.

The Majority Opinion argues that the conspiracy to commit a crime is a different offense from the crime itself. The Majority Opinion recognizes that our contentions make clear that the crime here involved, the receipt of compensation by a Congressman "necessarily involves the mutual cooperation of two persons," and that the Congressman "alone could not commit the statutory offense" and that his act of receiving compensation could not be performed by him alone and that some other person must necessarily give

it to him. The Majority Opinion argues that "although the offensive act necessarily involved the cooperation of two people, the part played by one of them alone is made a criminal offense" and holds that the conspiracy charged should, nevertheless, stand. In making this conclusion, the Majority Opinion admits its position is "not free from doubt" and that this result only seems "indicated" but not established by the decisions relied upon. Thus, the Majority Opinion states "the matter is not free from doubt that we are of the opinion that the answer is indicated by the decision in *United States* v. *Holte*,[2] *Ex Parte, O'Leary*[3] and *Vannata* v. *United States*."[4]

As Chief Justice Stephens points out the offense against the United States here involved is one requiring a concert of action, that is, an agreement between the parties involving the payment of compensation. Receipt of compensation cannot be accomplished without payment. Therefore, the crime requires concerted action and an agreement between the receiver and the giver. The Chief Justice concluded that the permitting of a conspiracy charge to be added to the substantive charge is "charging a conspiracy to conspire."

We do not propose to analyze the *Holte, Ex Parte, O'Leary* and *Vannata* cases in this Petition. Chief Justice Stephens in his Dissenting Opinion carefully analyzes each of them, distinguishes each from the case at bar, and we submit correctly concludes they are not controlling and that the principle announced by this Court in *Gebardi* v. *United States*, 287 U. S. 112, 121, 122 is controlling.

In the *Gebardi* case, this Court has discussed the point here involved and has held that where it is impossible under any circumstances to commit a substantive offense without

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[2] 236 U. S. 140.

[3] 53 F. 2d 956, cert. 283 U. S. 830.

[4] 289 F. 424.

cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy. The *Gebardi* case cites with approval many cases on this point, including *United States* v. *Dietrich*, 126 F. 644, 667. It seems to follow that this Court never intended in *United States* v. *Holte*, 236 U. S. 140 to restrict the ruling in the *Dietrich* case.

This Court in the *Gebardi* case also cited with approval the case of *United States* v. *Katz*, 271 U. S. 354. The *Katz* case supports our contention that a conspiracy cannot be added to a substantive offense "under the Federal Statute" (Section 88), which it is impossible to commit without cooperative action and a preliminary agreement.

In *Pinkerton* v. *United States*, 328 U. S. 640, 643, this Court makes it crystal clear that there are two instances where a conspiracy may *not* be added to the substantive charge. These are (1) where the agreement of two persons is necessary for completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime, and (2) where the definition of the substantive offense excludes from punishment for conspiracy one who voluntarily participates in another's crime. The case at bar falls within both of these categories.

We also contend that Counts III and IV are each duplicitous because they charge petitioner with receiving directly and indirectly from the Garssons compensation for services rendered, and further charge that the Garssons aided and abetted this direct receiving of compensation as well as indirect receiving of compensation. Such a method of pleading violates Rule 8(a) of the Federal Criminal Rules and renders these Counts invalid.

We further contend that Count I and Counts III and IV are invalid because they attempt to add a conspiracy charge and aiding and abetting to a substantive offense which

necessarily includes as a part of the offense a conspiracy, i. e., an unlawful agreement, and aiders and abettors. We submit, therefore, that these charges are invalid. Aiders and abettors cannot be added as principals or as conspirators because they paid money to a Congressman in violation of Section 203. Section 203 differs in language from Section 202, Title 18, the bribery statute. This indicates a Congressional intention of excluding from Section 203 any person other than the one receiving the compensation. The Majority Opinion admits that there is force to this argument and states: "If the two sections had been adjoining sections in the same Congressional enactment, there would have been great force in it."

Section 202 was passed in July 1862 and February 1863. As passed, Section 202 punished *both* the payment of a bribe and the receipt of a bribe, which made it clear that Congress made criminal both payment and receipt of a bribe. On the other hand, Section 203 which was passed in the following year (1864), did not make the paying of compensation criminal, but only the receipt of compensation. We submit that Congress, when it enacted Section 203, did not intend to punish the payer of the compensation. The Majority Opinion below argues that nevertheless the general aiding and abetting statute should be applied. As Chief Justice Stephens points out in his Dissenting Opinion, this argument fails because the law is settled that where a statue denounces an act as criminal but does not penalize the conduct of a necessary participant in that act, the participant may not be held guilty as an aider and abettor, citing *Gebardi* v. *United States,* 287 U. S. 112, 119. We submit the *Gebardi* case supports Judge Stephens' conclusion, and since Section 203 does not make it a crime to give compensation to a member of Congress, the necessary participant, the giver, may not by indirection be validly charged as an aider and abettor and certainly not in a

single count. We commend the reasoning of Chief Justice Stephens to the Court, as it is persuasive and conclusive. Chief Justice Stephens points out that these defects cannot be considered as harmless, that the jury was permitted to consider the case and to convict upon erroneous theories, that erroneous and prejudicial instructions concerning the meaning of the indictment were given the jury and that, therefore, petitioner and the other defendants were unjustly convicted.

The fact of this situation is that by giving different criminal labels to Count I on one hand and to Counts III and IV on the other, for the very same group of acts, it is sought to make them punishable several times, and the additional penalty provided under Section 203 has deprived petitioner of holding any office of honor, trust or profit under the Government of the United States. As Chief Justice Stephens well said, a conviction based upon such an indictment "cannot properly stand as to either May or the Garssons."

V

More than one-half of the grand jurors who returned the indictment in this case were government employees. Some of them were employees of the General Accounting Office, a department directly affected by the prosecution. One of the members was a government attorney and as such disqualified to sit on such a jury. This Court has never decided the question as to whether or not Government employees may properly sit as grand jurors in a case such as this. It has considered the practice of permitting government employees to serve as petit jurors. *United States* v. *Wood,* 299 U. S. 123; *Frazier* v. *United States,* 335 U. S. 497. These cases are inapplicable here *because no opportunity was afforded petitioner to examine such grand jurors for actual bias.* We submit such a jury so

selected is not a fair and impartial grand jury and does not meet the requirements of the Fifth Amendment to the Constitution of the United States. This question is novel, of first impression and should be decided by this Court.

VI

The courts below held that it is not necessary to prove a conspiracy by independent proof and it is not necessary to prove a particular party's connection therewith by independent proof. Assuming a conspiracy has been properly charged, which we deny, we submit there is no evidence to sustain any such charge and that petitioner's Motions for Judgment of Acquittal should have been granted. There is no evidence to show a conspiracy. Further, no evidence was submitted of even a single meeting where the conspirators met together. Every fact described in the evidence was legal and proper and concerned *only* so-called overt acts and things done in pursuance of the alleged conspiracy. We contended that such evidence pertaining to alleged overt acts and things said and done in furtherance of the conspiracy was inadmissible to prove the conspiracy. Such testimony was hearsay in character and incompetent. Testimony pertaining to the acts of one defendant are not admissible against another without proof aliunde of the conspiracy and that the person against whom such evidence was sought to be used was a party thereto. Accordingly, all evidence offered by the prosecution was objected to on this ground as generally incompetent, irrelevant, immaterial and hearsay, and not properly connected up because of the absence of independent proof establishing the conspiracy. The Court of Appeals refused to consider this contention, stating that it presented "broad generalizations."

As we read the Majority Opinion, they have refused to examine and read the exhibits and the testimony. Every act presented as proof of the conspiracy relates to the 35 overt acts and to other alleged overt acts and can not be used to establish the conspiracy itself. To illustrate, Government exhibits 1 through 11, 16 through 19(a), 85, 86, 93, 103 through 126, 128, 130, 131, 142, 149 through 169, 179 through 187, and the testimony of the witnesses pertaining to these exhibits were all hearsay insofar as petitioner was concerned, and generally incompetent, irrelevant and immaterial. In reaching the conclusion that testimony concerning overt acts could be used to establish the conspiracy even though they were hearsay, the rulings of the courts below are in direct conflict with the case of *Glasser* v. *United States*, 315 U. S. 60, 73-75.

This Court made it crystal clear in the *Glasser* case that evidence pertaining to admissions and statements, which are in the same category as hearsay acts, cannot be used to establish a conspiracy and are admissible against a defendant "only upon proof of the conspiracy" and "only if there is proof aliunde" that he is connected with the conspiracy. As this Court pungently says (75):

> "Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence."

To the same effect are *United States* v. *United States Gysum Co.*, 67 F. Supp. 397, 451.; *Thomas* v. *United States*, 57 F. (2d) 1039, 1041, 1042 and *Stager* v. *United States*, 233 F. 510, 513.

Moreover, the trial court admitted in evidence a great mass of irrelevant testimony pertaining to the "Greenbrier" transaction. This transaction arose in the following manner. The prosecution showed a $2500 deposit by Congressman May to his personal account in the National Bank of Wash-

ington from Murray W. Garsson. Evidence of payment *only* was produced. No explanation of the deposit was attempted though the prosecution knew it was made pursuant to the terms of contracts in existence prior to the date of the conspiracy. Without any proof whatever of the purpose of this payment, and over objections of the petitioner, this payment to be received in evidence. The mere showing of the receipt of $2500 did not establish that it was for compensation. Accordingly, Motions to Strike this evidence were made but were denied, which required petitioner to prove all the facts and circumstances surrounding this payment. The undisputed evidence then showed an agreement dated April 2, 1941 [5] from petitioner to Murray W. Garsson and Joseph F. Freeman, signed by all of them (R. 3666), which recited that it was the express obligation of Garsson and Freeman to make good funds expended by May and a Mr. Martin for the benefit of the Greenbrier Mining Corporation. The undisputed testimony was that the $2500 payment was made pursuant to this agreement. The situation was further clarified by written contract with the First Pan American Mercantile Corporation (R. 2436). The Greenbrier transaction involved 7,000 acres of mineral lands in West Virginia. Petitioner and other persons not involved in the charges of the indictment on April 2, 1941 entered into a written contract pertaining to this land. This agreement grew out of undisputed negotiations extending *back into the year 1940*. At this time petitioner did not even know Henry M. Garsson and the Erie and Batavia Companies had not even been organized and, of course, had no contracts with the United States. Under a refinancing arrangement and in order to protect the stockholders of the Greenbrier Corporation, May agreed to furnish accommodation notes to Murray W. Garsson and

[5] The conspiracy is charged to have commenced January 1, 1942.

Mr. Freeman and entered into a Trust Agreement under which stock in new corporation was received and placed in trust for the benefit of the old stockholders (R. 3265, 2435). Finally Murray W. Garsson with the assistance of his brother Henry paid the sum of $2500 then overdue under this agreement to May. This payment was made in regular course of business pursuant to a written agreement and came as a logical result of transactions of plain relevency dating back to the year 1940. Neither Dr. Garsson nor the Erie and Batavia Companies were either directly or indirectly interested therein. Yet all of this evidence was permitted to remain in the record even though the Government made no effort to dispute the truth of the transaction as is disclosed by petitioner's evidence. Under the decisions below the situation boils down to the proposition that all the prosecution needed to make out a case of the payment of compensation illegally is to show payment by either of the Garsons to May, and irrespective of the purpose of the payment this makes out a prima facie case of guilt. We say this is incorrect and that the prosecution must establish the fact that the payment is compensation. *People* v. *Rides* (C.A. N.Y. 1937), 273 N.Y. 214, 7 N. E. 2nd 105. As they admittedly failed to do this in this irrelevant transaction the evidence pertaining thereto should have been stricken from the record and it was prejudicial to leave such evidence in the record and use it as a basis for establishing not only the conspiracy charged in Count I but also the substantive offenses charged in Counts III and IV. Such action violates the principles laid down in the *Glasser* and *Stager* cases and deprived petitioner of a fair trial.

In this connection, the defendant Freeman was acquitted. Testimony pertaining to the acts, statements and letters of Joseph Freeman had been received in evidence against all defendants, including petitioner. On Freeman's acquittal

petitioner moved to strike such testimony. The courts below held that such evidence could be received even though *it could not be admitted under the co-conspirator rule,* as Freeman was *not* a conspirator, on the theory of agency. The Majority Opinion stated that Joseph Freeman was the Washington representative of the Garsson companies and that this made his evidence admissible. No contention was ever advanced that Freeman was an agent of Congressman May or was in his employ and there was no such evidence. The argument that because he was the Washington representative of the Garssons makes evidence pertaining to him admissible as to petitioner is unsound. Petitioner was a Congressman. He did not employ Freeman and at no time did Freeman ever act as petitioner's agent. It is undisputed that Freeman was not a conspirator. Accordingly, the activities of Freeman, the statements of Freeman and his relationship and dealings with the Garssons and the United States Government were inadmissible against petitioner. Yet the courts below permitted, over objections of petitioner and against a Motion to Strike, such evidence to remain in the record against petitioner and to be used to establish the conspiracy charged in Court I *and the substantive charges contained in Counts III and IV.* This is error. *Brown* v. *United States,* 150 U. S. 93; *Stager* v. *United States,* 233 F. 510; *Pope* v. *United States,* 289 F. 312.

We contend that the evidence relating to Freeman, which dealt with statements and transactions occurring out of the presence of May and without his knowledge was subject to the long recognized rule that acts, declarations and things done by one alleged conspirator in the absence of another is incompetent and hearsay and becomes admissible only after a conspiracy has been established by proof aliunde, and after such conspirator by proof aliunde has been connected up with the conspiracy. *Glasser* v. *United States,* 315 U. S. 60; *United States* v. *United States Gypsum Co.,*

67 F. Supp. 451; *Thomas* v. *United States,* 57 F. (2d) 1039, 1041, 1042.

Certainly the evidence pertaining to Freeman who was acquitted and was not May's agent, under no theory of law was admissible to prove the conspiracy or the substantive offenses here involved. The presence of such testimony in the record deprived petitioner of a fair and impartial trial. *Stager* v. *United States,* 233 F. 510, 513.

As the Majority Opinion admits that its position in affirming the judgment of conviction against petitioner is not "free from doubt" and that affirmation seems "indicated", coupled with the statement that the "evidence of conspiracy if there be any" is in acts clearly inadmissible, we submit the case against petitioner is not a strong one. At no point in the record has the Government been able to call attention to any direct evidence or substantial evidence of "res gestae" character. All of the essential and ultimate facts necessary to convict under each count are left to pure inference and speculation. In such a situation, the principles announced by this Court in *Glasser* v. *United States,* 315 U. S. 60, are peculiarly apt and require a reversal. This Court held (p. 67):

> "* * * in all cases the Constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be poised between guilt and innocence. Then error, which under some circumstances would not be granted reversal cannot be brushed aside as immaterial since there is a real chance that there might be provided a slight impetus which swung the scales toward guilt."

VII

Evidence provisionally received under Count I included evidence of overt acts, statements and things allegedly done in pursuance of a conspiracy, was used to establish the substantive offenses charged in Counts III and IV of the

indictment. We know of no rule of law which permits such a practice. The use of evidence of this character provisionally received applies only in conspiracy cases. This rule of evidence should not have been applied insofar as the substantive offenses in Counts III and IV are concerned. Not only did the Trial Court stretch to the limit the conspiracy rules of evidence in direct violation of the ruling in *Glasser* v. *United States, supra,* and similar cases, but it permitted hearsay evidence, and the evidence concerning Freeman who had been acquitted and was not May's agent to be used as we have indicated, to prove the substantive offenses involved. Such evidence was not available for such purposes. Moreover the judges of this country are waking up to the dangers inherent in the extension of conspiracy principles and rulings and that these principles are being abused.[6] Such abuses should be corrected by this court.

VIII

The charges here involve intent. Count I is a conspiracy charge involving two offenses of intent. Counts III and IV involve agreements under which petitioner is supposed to have received money as compensation for services. The

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[6] See Annual Report of Attorney General for 1925 pp. 5 and 6 which quotes from the conference of Senior Circuit Judges Report in 1925 which points out these dangers and evils and the use of the rules of evidence in conspiracy cases and their extension make it difficult for defendants to have a fair trial. To permit time-tried rules, to be distorted, as they were in this trial, would be to destroy the blood-bought guarantees written into our Constitution protecting against unjust deprivation of the citizen's life, liberty and property. The receipt in evidence of the Freeman testimony and the utilization of conspiracy rules to establish the substantive offenses here involved is prejudicial error, deprived petitioner of a fair and impartial trial and requires a reversal. As Mr. Justice Jackson pointed out in *Krulewitz* v. *United States,* 69 S. Ct. 716, 719, *et seq.*, there should be no straining to uphold any conspiracy conviction which seems to have been used to get procedural advantages in order to ease the way to conviction. Such procedure he characterizes as "most odious" of all oppressions which mask as justice.

District Court permitted petitioner and his co-defendants to testify as to their motives and intents but would not permit any corroboration of this evidence. Accordingly, petitioner offered to prove facts which would actually show discrimination by the War Department against the Erie and Batavia Companies, the production record of these companies, the affairs of the Military Affairs Committee as they pertain to petitioner's activities, actual justification for complaints made to petitioner by the Garssons, actual delays in production, requests of other Congressmen made to the War Department, and that petitioner was right in intervening, as such intervention was essential to expedite the production of needed munitions of war, as his reasons for doing what he did. As it was claimed that satisfactory services were performed by May, he offered to prove that his intercessions with the War Department on behalf of the Garssons produced no satisfactory results. These offers of proof to corroborate the testimony of petitioner as to his intent and motives were rejected. The court below states that this rejection presents a "basic" question in the case. The court adopted the view that such proof was immaterial to the issues in the case, though it admits that if this were a *fraud* case, the cases cited by petitioner and his co-defendants would be in point. We are at a loss to understand this argument. There was no direct or indirect evidence to show that the so-called "services" performed by May were (1) performed pursuant to the conspiracy charge in Count I or (2) performed because of compensation paid as charged in Counts III and IV. These ultimate facts were left entirely to inferences. No evidence on these points has been pointed out by the prosecution at any time during this case. As the court below conceded that such evidence would be proper to show what was in May's mind and the motives of the Garssons if this were a *fraud* situation, we submit that the evidence was admissible because

Count I *charges a conspiracy to defraud.* Therefore, cases dealing with fraud in which intent is the necessary element are pertinent. It was the theory of the Government that all of the acts here involved were done for an unlawful purpose, that is to defraud the United States. The issue is one of pure intent. We contend that in every instance where the prosecution offered testimony concerning a specific act, telephone call, thing or letter, that petitioner had the right to prove all the circumstances leading up to and culminating therein. The trial court permitted unrestricted evidence by the prosecution concerning these matters in the first instance and when defendants proceeded to bring in their evidence to show the full picture, the proof was restricted. Cross-examination was likewise restricted in accordance with this theory. We do not see how a jury can properly evaluate the telephone calls, acts and letters without knowing all of the facts concerning each of them. The jury was permitted to consider all these circumstances and find from the the unlawful *intents* required for a finding of guilt. If a jury is permitted to do this, certainly they should have all the evidence before them when they weigh each act to determine the proper inferences to be drawn therefrom. While the trial court made the ruling it would not permit any motives assigned to the doing of certain acts by the petitioner to be contradicted, it nevertheless submitted those motives to the jury and instructed the jury they could believe them or not as they saw fit. We insist that this was prejudicial error because if such motives are going to be speculated on without the evidence thereon being contradicted, it follows that a defendant has the right to corroborate his testimony because the credibility of such testimony is being submitted to the jury for determination. Oral offers of proof were made followed by written offers of proof on this vital aspect of the case (R. 1752, 2757, 2764, 2765 and 5140). The rulings below rejecting these offers of

proof conflict with *Miller* v. *U. S.*, 120 F. 2d. 958, 970-971; *C. I. T. Corporation* v. *U. S.*, 150 F. 2d. 85; *Norcott* v. *U. S.*, 65 F. 2d. 913, cert. den. 290 U. S. 694.

As the facts offered to be proved were basic links in the chain of evidence, it was prejudicial error to refuse these offers, *McCandless* v. *United States*, 298 U. S., 342, 346-348. As this Court has decided in the *McCandless* case, it is not necessary that the offer cover every fact necessary to prove an issue. It is enough if the offer is a starting place and may tend legally to prove any part of the case.

IX

The charge to the jury was incorrect, inconsistent and misleading and prejudicial. It followed the erroneous theory of the prosecution that a conspiracy can be added to the substantive offenses charged in Counts III and IV of the indictment. It also followed the erroneous theory that there can be aiders and abettors to the offenses charged in Counts III and IV. The jury was instructed that the co-defendants of petitioner would be principals to the offense defined in Sec. 203 (R. 6956). A conspiracy was defined as doing something which was lawful *but means which were unlawful.* This is inconsistent with the evidence and with the ruling of the trial court that no unlawful means or unlawful overt acts were involved. The conspiracy here could only be one *for an unlawful purpose* (R. 6970).

The conspiracy instruction were confusing in that the jury were instructed that the conspiracy involved two things, a scheme to commit an offense against the United States and a scheme to defraud the United States. Yet when the Court stated what evidence was necessary for a conviction under Count I, it merely charged that if the defendants agreed to give petitioner money as compensation for services that would establish guilt under Count I (R. 6971,6973).

The court instructed the jury to consider all of the evidence in considering whether the defendants were guilty of the offenses charged in the indictment. This permitted the jury to consider evidence pertaining to overt acts, statements and things done in pursuance of an alleged conspiracy as proof not only of a conspiracy but of the substantive offenses charged in Counts III and IV. This is obvious error as such evidence is not available for either purpose. *Glasser* v. *United States, supra.*

Moreover, *after* the case had been fully argued and *after* the court had advised all defendants that all of the government's instructions were denied, during the course of the charge and in violation of Rule 30 of the Rules of Criminal Procedure, which requires the court to inform counsel of its rulings *prior* to their argument to the jury, the court granted Government instruction No. 12. This instruction is an improper one, as will be seen from a mere reading of it. It was highly misleading, argumentative and an incorrect statement of the law (R. 6981-6983). It destroyed the defendants' case. It characterized evidence which had been received in the case but which had not been stricken "as immaterial". It characterized the defendants' defenses as immaterial. The so-called facts characterized as immaterial in the instruction would have to be considered by the jury in determining the motives of petitioner. It is no answer to say that during the course of the charge, the court stated these facts should be considered, because they were told they could believe or disbelieve the truth of such *undisputed* facts. The charge amounts to an argument that all the defendants are guilty and over emphasized the prosecution's theories and evidence to the prejudice of petitioner. The charge generally conflicts with *Glasser* v. *United States, supra.* Count III charges a substantive offense and is restricted to a $5,000 payment. Notwithstand-

ing the limited scope of Count III all evidence in this case under Count I and all evidence submitted under Count IV, which is but a restatement of the conspiracy charge, was considered by the jury as evidence under Count III. This is obvious error, misled the jury and permitted a great mass of incompetent and irrelevant evidence to be considered.

As a conspiracy cannot be added to the substantive offenses charged, it was error to include Count I in the charge and to receive evidence thereunder. This amounts, in effect, to an instruction to the jury that petitioner was guilty of a conspiracy to conspire as so aptly pointed out by Chief Justice Stephens. The substantive offenses charged in Counts III and IV exclude the giver of the compensation from punishment. It was error to instruct the jury that the Garssons could be convicted as principals and this erroneous instruction was prejudicial to petitioner. The charge deprived petitioner of a fair and impartial trial.

The case was tried below under circumstances highly prejudicial to petitioner. The record shows highly inflammatory and prejudicial articles appeared in the newspapers prior to and throughout the trial. In this atmosphere without attempting to explain the Trial Court's attitude, we submit it became hostile to the interests of the defendants and many actions taken by the trial judge were highly prejudicial (R. 1141, 1273, 1695, 1707, 2478, 2479 and 2486). In numerous instances, the prosecution was guilty of prejudicial misconduct warranting the granting of a mistrial (R. 648, 2148, 1546, 1619 and 5052). One of the prosecutors utilized his rebuttal time for the purpose of making an opening argument. The request of counsel to reply to the new matter brought in by this unfair method of argument was denied (R. 6940-6945). None of these errors were corrected and when considered as a whole deprived petitioner of a fair and impartial trial. Accordingly, we

submit that the principles announced in *Berger* v. *United States*, 295 U. S. 78, 88-89; *Hall* v. *United States*, 150 U. S. 76 and in the Dissenting Opinion of Mr. Justice Roberts in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 264, 267, should be followed and the judgment of conviction below should be reversed.

Space does not permit a detailed argument covering all of the assignments of error. Each is meritorious and we submit warrants a reversal. Many of the assignments are discussed in the Petitions filed by Henry M. Garsson and Murray W. Garrson. We adopt these discussions by reference and ask that this Court consider those discussions in ruling upon this Petition.

CONCLUSION

We cannot close this Petition without reminding this Court of certain facts which should weigh heavily in the ultimate decision in this case. As Chief Justice Stephens pointed out, the judgment of conviction not only imposes imprisonment but in fact makes it incapable for petitioner to hold any office of trust or profit in the Government of the United States. Petitioner is a man past seventy-two years of age and is ill. Until the present indictment he had a stainless reputation in his community, among his neighbors, friends, colleagues, and parties in high Government circles, inside and outside of Congress (R. 2340, 3385, 3404, 3407, 3409, 3369, 3376, 3394, 7070 and 7076).

Petitioner lived his early life under rugged conditions with slight chance for an education. Yet through hard work from childhood on, he worked his way through country schools to become a schoolteacher. Later he entered the legal profession where he attained an execellent reputation as a lawyer. Twice he served as County Attorney for his home County and later as a Circuit Judge. He has practiced law for more than forty-nine years. He is a member of

this Court. He has been active in social and church activities. He has sponsored successful business enterprises in his community. He was first elected to Congress in 1930. He served with great distinction as a Representative eight full terms, sixteen years. Petitioner has a dependent daughter and three dependent grandchildren.

Petitioner's record during the trying years of the war is an enviable one. He even performed special missions for President Roosevelt. His office was open from 7:00 in the morning until late at night, practically every day of the week. He gave unstintingly of his time to further our war effort. That he performed his public work zealously and uprightly is unquestioned. These matters are no small things. In making these statements we do not mean to infer that we are asking for pity. We are merely asking that this Court take these facts into consideration and weigh them as we consider the final result a travesty of justice, particularly when the Majority Opinion concedes that in affirming the judgment it was "not free from doubt". If such a dubious judgment is permitted to stand, the result will be the destruction of a fine public servant of stainless reputation. It may further result in his death.

Wherefore, it is respectfully submitted that this Petition for Certiorari to bring before this Court the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit should be granted.

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JUNE 3, 1949.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

ANDREW J. MAY,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent

MOTION TO DISPENSE WITH PRINTING OF RECORD ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Petitioner, Andrew J. May, by his attorneys, and respectfully moves this Honorable Court to permit Petitioner to proceed with his Petition for Writ of Certiorari seeking review of the decision and judgment of the court below without being required to print the record in said cause. Judgment was entered on January 24, 1949 in the United States Court of Appeals for the District of Columbia Circuit. A Petition for Rehearing was timely filed, considered and denied. This Court has extended the

the time of the filing of this Petition for Writ of Certiorari to June 4, 1949.

The record was not printed in the court below for the reason that that court permitted the Petitioner to proceed on the typewritten transcript and original exhibits. Counsel for Petitioner have had printed in appendices all those portions of the record which were felt germane to the consideration of the questions to be passed on Certiorari with the exception of those questions which pertain to the sufficiency of the evidence and its admissibility. One complete copy of the printed transcript has been duly certified to by the clerk of the court below and has been filed with this Court for reference. Accordingly, in order that consideration of the Petition for Writ of Certiorari may be had during the present term of this Honorable Court, the Petitioner files this Motion asking leave to proceed on the typewritten transcript and original exhibits and the printed portions of the Record filed with this Court. Petitioner feels that the interest of justice requires that this Motion should be granted and he should be permitted to file his Petition for Writ of Certiorari without being required to print the voluminous Record involved in this case.

WHEREFORE, the premises having been duly considered, it is respectfully prayed that leave be granted for Petitioner to file a Petition for Writ of Certiorari on the typewritten transcript and original exhibits as embodied in the original Record certified to this Honorable Court by the Clerk of the United States Court of Appeals for the District of Columbia Circuit.

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JUNE 3, 1949.

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CHARLES ELMORE CROPLEY
CLERK

APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. ~~840~~ 100

ANDREW J. MAY, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

No. ~~841~~ 101

MURRAY GARSSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

No. ~~842~~ 102

HENRY M. GARSSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPREME COURT OF THE UNITED STATES

No. —

ANDREW J. MAY, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

No. —

MURRAY GARSSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

No. —

HENRY M. GARSSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI

Instructions of the United States District Court for the District of Columbia to the Jury.

July 2, 1947

Charge to the Jury

"The Court:

The Court: (Schweinhaut, J.) Now, ladies and gentlemen: I am going to try to discuss the law of this case with you briefly.

I don't intend to comment upon the evidence except only as it may be necessary to make clear some principle of law concerning which I will have to instruct you.

To comment upon the evidence otherwise would cause me to do almost as comprehensive a job, in order to do it fairly and objectively and thoroughly, as counsel have, and I think you have heard enough argument in the case.

Moreover, the case has been very well tried. It has been very well argued by the lawyers on both sides. And you have listened, as both counsel have told you, with unusual attention, for which the Court also is grateful.

I have had occasion to comment in that regard to you before, and I want you to continue your patience until the matter is finally decided by you.

You have been told that it is an important case. Of course it is an important case, but all the cases in the courts are important. The cases you have already tried in this court are important—were important—and I don't want you to lose your objectivity, which it is necessary that you maintain, by getting your mind off on the avenue of thought as to how important the case is.

This case does call for a high degree of objectivity and a thoughtful application of commonsense, but I have no fear whatever that you will give it that.

It has been a long case and counsel on neither side are to blame for that, in my opinion.

I think the evidence that this Court admitted was all entirely competent, and that the nature of it was such as to make it a longer trial than any of the lawyers or I thought at the outset it would be.

Actually, however, the issues are quite simple,—really as simple as any case you have tried in this court room, when you come down to the fact of the matter—and I want to talk with you about them in simple language.

I have not prepared a written charge because I would rather talk to you than to read to you, except in some instances I will have to do that, and I want to talk with you in simple language.

This is not a charge drawn for lawyers or law books, but for you who are the triers of the facts in the case.

First I want to remind you of some general principles as to which I have had occasion in the past to instruct you.

First, you are instructed that it is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case for yourself but you should do so only after discussing it with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is unreasonable or erroneous.

You should not be influenced though in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor a particular decision or hold an opinion at variance with your own. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors, but you must listen to your fellow jurors calmly and sympathetically and with understanding and with a willingness to appreciate the view that your fellows express so that you won't be just stubborn and resist reasonable persuasion and reasonable argument as to what the facts are in the case, all to the end that your judgment will be an independent but collective, unanimous judgment.

You are further instructed that the attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance. It is unbecoming for a juror upon entering the jury room to voice an emphatic expression of his opinion on the case or to announce his determination to stand for a certain verdict. When one does that at the outset, his sense of pride may cause him to hesitate to recede from an announced position even though it may be shown that it is fallacious.

Remember that you are not partisans or advocates in this matter, but you are judges. The final test of the quality of your service will lie in the verdict which you return to this courtroom, not in the opinions any of you may hold as you retire.

Bear in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case.

To that end, the Court reminds you that in your deliberations in the jury room there can be no triumph other than the ascertainment and declaration of the truth.

Now, also I want to remind you, as I have before, that the indictment is not evidence in the case, nor is the fact that a Grand Jury found an indictment to be considered by you as evidence. It is merely the formal accusation of crime. It is merely the medium or vehicle by which the matter is brought for the first time before jurors, such as you, for final determination as to the truth or as to the validity or invalidity of the accusation, the innocence or guilt, as the case may be, of the defendants.

On the contrary, defendants in a criminal case are presumed to be innocent of the crime charged against them, and that presumption remains with them throughout the trial, and it prevails until and unless in your final deliberations you should become convinced of their guilt beyond a reasonable doubt. Hence, the burden rests upon the Government to establish guilt—not upon the defendants to establish innocence.

Now, a reasonable doubt is what the term implies. It is a doubt based upon reason, arising out of the evidence or lack of evidence in the case.

It is such a doubt as after a full and fair consideration of all the evidence will leave a juror's mind so undecided that he does not have an abiding conviction of the defendant's guilt, that is, a settled conviction of guilt, which he believes will remain unshaken by future thought and reflection.

It is such a doubt as would cause a reasonably thoughtful and prudent person to hesitate to act if confronted with a question of importance concerning his own affairs.

Such a doubt does not arise from mere conjecture, speculation, whim, or caprice, nor from reluctance to convict through feelings of sympathy or mercy. It is a conscientious belief arising only after calm, dispassionate and impartial consideration of all the evidence that there is a reason to doubt the defendant's guilt.

And, of course, it does not imply proof beyond all doubt. Happenings between human beings cannot usually be proven to an absolute certainty. Hence the law does not require it.

It does, however, require as a fair shield of protection that one shall suffer the loss of his good name, of his liberty or his life, as the case may be, until his guilt has been established beyond a reasonable doubt, as I have defined it.

If upon the whole evidence, again not upon speculation or guess or suspicion, but from the evidence in the case there are two equally balanced hypotheses, inconsistent one with the other, a hypothesis consistent with guilt on the one hand, and a hypothesis consistent with innocence on the other, you must take the one most favorable to the defendants.

That means, of course, not just that there are two theories in the case, the one offered through the evidence on the part of the Government and the other—inconsistent with that—offered on the part of the defendants. They must be equally consistent in your mind, after having exercised your reasoning powers and after having given thought in weighing and evaluating the testimony. If you find then that these inconsistent theories are in balance, you must acquit.

In judging of the evidence you must evaluate the testimony of individual witnesses. Only thus can you determine the truth, and it is the truth you seek.

Bring to that task your knowledge of human nature; your commonsense; your ability to judge of men; their sources of knowledge; their intelligence; their motives; their intentions, all as you may discern the real character behind the spoken words and measure their weight of truth and accuracy.

You may, of course, in considering the testimony of individual witnesses, take into account their manner and demeanor and conduct on the witness stand.

Now, interest in those things involved within the controversy or its results; friendship or animosity towards persons concerned therein, and many other human factors, may or may not affect the desire and capacity of a witness to tell the truth.

Give to the testimony of each witness that weight and that weight only that you believe it is entitled to when viewed in the light of these considerations and in the light of all the other evidence in the case.

Now, in weighing the testimony, in judging of the plausibility or implausibility of the story that the witnesses have told, you are instructed that if in your opinion any witness has testified falsely concerning a matter as to which he could not reasonably be mistaken, you may disregard and reject all or any part of the testimony of such witness.

You are instructed that the fact that the defendant, Murray Garsson, has not testified in his own behalf should not be considered or construed in any way against him, and you are not at liberty to indulge in any presumption or inference because he has not testified in his own behalf. He has a right to testify, or not, as he pleases.

The defendants, May and Henry Garsson, have introduced evidence on their behalf to the effect that their reputation for honesty and integrity is good. You are instructed in this respect that as a matter of law the circumstances of a case may be such in your minds that evidence of good character may alone create a reasonable doubt although without it the other evidence would be convincing. That evidence is to be considered and weighed with all the other evidence in the case, and you may consider, if you find that it is so when you have evaluated the evidence, that it alone may create a reasonable doubt, and that is for you to determine.

Now, in that connection, I have granted defendants' request for instruction, which reads as follows, and I will read it as they submitted it to me:

Certain character witnesses have said that they had heard that Henry M. Garsson, one of the defendants, was indicted, tried and acquitted, of an alleged violation in a District Court in New York; and in connection therewith and prior thereto, was dismissed from the Revenue Department, and that Henry M. Garsson was later denied admission by the New York State Bar Committee, but that this did not affect their opinion of the reputation of the said defendant. This evidence of the prior and of refusal of admission to the Bar must not be considered by you as substantive evidence or as affecting Henry M. Garsson's credibility as a witness. It was only offered for the purpose of affecting the credibility and or knowledge of the

character witness himself and cannot be used in any way as evidence against the defendant, Henry M. Garsson.

You will be given the indictment to take with you, and you will notice that in it there are four counts. The counts, as I am sure you have already been told in the past, by me, means charges. Each count is a separate charge.

One of them, as you have been told, Count 2, is out of the case, so don't take the time to read it even. Count 2 and Count 3 charge precisely the same offense; except for technical reasons they were couched in somewhat different language, and the Government has elected to submit the third count to you rather than the second.

I shall address myself first to the third and fourth counts of the indictment, and then come back to Count One, solely for the reason that I have a little bit more to say about Count One than I have about the other two.

Count 3 and Count 4, as well, charge violations of a Federal law, which I will read to you and tell you what the Government charges with respect to it.

That law, so far as applicable here, reads as follows:

> "Whoever, being elected or appointed a Member of Congress, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, shall directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation or arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or national commission whatever, shall be punished."

That is the language of the statute which the indictment charges was violated specifically, in Counts three and four.

Those two counts, each of them charge in substance that Congressman May, being a Congressman at the time, did receive compensation for services rendered or to be ren-

dered to the defendants, Henry M. Garsson and Murray W. Garsson; and it also names Joseph F. Freeman, who, as you know, is no longer in the case.

That is the offense which this statute announces.

They also charged in each of those counts that the defendants, Henry Garsson and Murray Garsson, while themselves incapable since they were not members of Congress and didn't receive compensation, but that they nevertheless are guilty with Congressman May, as principals, because by giving him the alleged compensation they thereby aided and abetted him in the alleged violation of this Section 203, Title 18, of the Code, which I have just read to you.

In that respect another section of the Criminal Code provides that whoever aids, abets, counsels, commands, induces or procures the commission of an offense defined in any law of the United States, is a principal. That is just as much so as in this case the Congressman himself, if he were guilty.

So that they charge in the third and fourth counts a joint offense by these three remaining defendants.

You could not find that either Henry Garsson or Murray Garsson were guilty unless you also found that Congressman May is guilty. That is so as to each of those two counts. That is so, as a matter of fact while I think of it, of all three counts in the case. I forgot to tell you that when I came back to number one.

Mr. May, if he is guilty at all, is in each one of these three counts, and you couldn't find under either one of these three counts either or both of the other defendants guilty and Congressman May not guilty. You could not do that.

You could find that Congressman May and either one or both of the other two defendants were guilty. You could find one of them not guilty and the other guilty, but in no case could you acquit the defendant May and convict either or both of the other defendants.

I granted defendants' request for instruction concerning Count 3 in the indictment, which I have somewhat changed, and I will also read that to you:

Count 3 of the indictment charges the receipt of a check of the sum of $5000 by the defendants, Henry M. Garsson

and Murray W. Garsson, and Erie Basin Metal Products, Inc., to Andrew J. May.

In this connection, in order to establish the offense charged in Count 3 of the indictment, you must find beyond a reasonable doubt from the evidence that payment was made directly or indirectly by check of the Erie Basin Metal Products, Inc., of the value of $5,000, by the defendants, Henry M. Garsson and Murray W. Garsson to Andrew J. May in return for the rendition of services by Mr. May. The evidence of the Government must conform to this allegation.

If you find from the evidence with respect to Count 3 that the Government has failed to prove the payment in the sum of $5,000 to the defendant May for compensation, or that the evidence on this aspect of the case is evenly balanced, as I told you a bit ago, or that the evidence on this aspect of the case does not convince you beyond a reasonable doubt of the evidence of such a payment, then you must return a verdict of "not guilty" as to all the defendants on the third count.

With respect to the fourth count I granted the defense request for instruction, which I will read also:

Count 4 of the indictment charges the agreement to receive, directly or indirectly, by Andrew J. May, from Henry M. Garsson, Murray Garsson, Erie Basin Metal Products, Inc., and Batavia Metal Products, Inc., compensation for services rendered and to be rendered by Andrew J. May to Henry M. Garsson, Murray W. Garsson and the corporations, in the sum of $15,477.60 from Batavia Metal Products, Inc., and the sum of $38,156.47 from Erie Basin Metal Products, Inc.

In this connection, in order to establish the offense charged in Count 4 of the indictment, you must find beyond a reasonable doubt from the evidence that there was in existence an agreement to receive, directly or indirectly, the sum of $15,477.60 from Batavia Metal Products, Inc., and the sum of $38,156.47 from Erie Basin Metal Products, Inc., by Andrew J. May in return for the rendition of services by Andrew J. May to Henry M. Garsson, Murray W. Garsson, Erie Basin Metal Products, Inc., and Batavia Metal Products, Inc.

The evidence of the Government must conform to this allegation. If you find from the evidence that the Government has failed to prove the agreement to receive, directly or indirectly, the aforementioned sums by Congressman May for the rendition of his services as aforesaid, or that the evidence on this aspect of the case is evenly balanced, or that the evidence on this aspect of the case does not convince you beyond a reasonable doubt of the existence of such an agreement, then you must return a verdict of "not guilty" as to all of the defendants on that count.

There is one modification of that instruction that I will make, and that is that it is not necessary to prove those two amounts down to the exact penny. The proof must be substantially near those two named amounts. It doesn't have to be established by the Government to the exact penny.

I think that, for the moment, is sufficient with respect to those counts.

The first count of this indictment charges a conspiracy by these three defendants, and also by Joseph Freeman, to do two things: To violate a law, to commit an offense against the United States and to defraud the United States. The statute under which that count is laid is a simple one and I will read that to you:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished."

You will note that the elements of this crime of conspiracy are three:

(1) A conspiracy by two or more persons.

(2) The purpose of the conspiracy must be to commit an offense against the United States or to defraud the United States in any manner or for any purpose.

(3) Some act must be committed by one or more of the people charged to effect, that is, to bring about, the object of that unlawful agreement.

I will discuss those three elements.

First, as to the meaning of conspiracy. It implies, of course, an agreement of two or more people in the meeting of their minds in a common purpose to accomplish or carry out some act. In this sense a conspiracy may be either entirely lawful or it may be unlawful. But an unlawful conspiracy, which is what is charged by the first count of the indictment, means an agreement of two or more persons to do something that is in itself unlawful, or to do some act which may be lawful but to do it by means which are unlawful, or for a purpose which is unlawful.

And what the Government by this indictment charges in the first count is that these defendants agreed with each other that Congressman May would receive compensation for services rendered and to be rendered by him on behalf of these individuals and the Erie Basin Metal Products Company and the Batavia Metal Products Company. That is the gist of the charge in that first count.

With respect to the second element: The conspiracy must have for its purpose, the agreement must have, the unlawful agreement must have the purpose either to commit an offense against the United States or to defraud the United States.

The word "offense" against the United States as here used has been legally held to mean to violate some criminal statute of the United States.

As applied to this case it is the contention of the Government that the criminal statute, which it was the object of the alleged conspiracy to violate, was this Section 203 of Title 18 which I read to you a few moments ago, which makes it an offense for a Congressman to receive compensation in respect of a matter concerning which the Government is interested.

The Government also contends that the conspiracy in this case was to defraud the United States, as prohibited by the conspiracy statute which I read to you.

You will note the language of that statute forbids an illegal agreement to defraud the United States in any manner or for any purpose. It has been legally decided by the Courts that this phrase "defraud the United States in any manner or for any purpose" is not limited merely to con-

spiracies to deprive the United States of money or property or other things of pecuniary value.

It also comprehends the right of the Government not to be defrauded of the unbiased, independent, faithful, loyal services of its employees, including Congressmen.

And so the allegation, and it is spelled out in the indictment at lengths to which it is unnecessary for me to go, is in that regard that these defendants, including Mr. May, got together and agreed to defraud the Government of his independent, honest, unbiased, unprejudiced, faithful, loyal services as a Congressman.

I should say this with respect to both phases of the statute which has to do with a conspiracy and agreement to commit an offense, the alleged agreement to defraud the United States:

I don't mean to say that it is necessary for the Government to establish that the defendants got together and said, "Let's violate, let's agree together to violate Section 203 of Title 18 of the United States Code."

Or, that they got together and said, "Let's agree to defraud the United States out of your faithful, independent, loyal," and so forth "services."

If they agreed to give him money as compensation, and if he agreed, if it was even implicit in it, if he intended and they knew it and he knew it, if he intended by virtue of that compensation to perform services such as have been alleged and I have described in the indictment, that constitutes the kind of an agreement that the law has in mind and makes illegal.

The third necessary element of the crime charged against these defendants is that the alleged agreement is not deemed to have been completed unless and until one of the parties, one or more of the parties, to the agreement shall do an act to effect and carry out the object of the agreement.

You cannot commit the attempt to commit a particular crime unless you do some act to carry out the intent which has been formed specifically.

That is true here. The Congress has not made it a Federal offense to sit down and agree to violate the law or to defraud the United States alone. The offense is complete only when one or more of the parties in agreement do something to

try to bring it about. And those acts are known as and they are described among others in the indictment as overt acts. There are some thirty or more, I think, set out in the indictment as being so-called overt acts which were designed to bring about this agreement.

The act which is done does not have to accomplish the final and ultimate result desired, nor does it have to be itself an unlawful thing, but it has to be something done physically and outwardly to tend to put into effect or to definitely manifest what was the purpose of the alleged agreement.

The word "overt" in this sense has the sense of an open act, and the indictment specifies a number of them. It means some physical action done for the purpose of carrying out or effecting the object of the conspiracy.

I think I have said this to you: It is not necessary to the offense that those acts or any one of them shall themselves be unlawful. It is sufficient, even if entirely lawful, provided it is done to effect the object of the agreement. Nor is it necessary in this case for the Government to prove all of the separate overt acts which they have set out in the indictment; it is sufficient if the Government proves any one of them.

Now, I point out again that it is not necessary to the establishment of the charge of the unlawful conspiracy and agreement that the object of the conspiracy should in fact be actually accomplished. The essence of the crime of conspiracy is the unlawful agreement to accomplish an unlawful act and the charge is not that the unlawful act was in fact accomplished. It is the agreement, that is, the meeting of the minds, of two or more persons, to accomplish the purpose, followed by some act for the purpose of accomplishing it, although the purpose is not accomplished, that constitutes the crime.

Now, you may, in considering whether there was an illegal agreement, take into account, and give such weight to them as you think they are entitled, the various alleged overt acts, if you believe any of them were done at all, in determining whether those very acts indicate the pre-existing agreement.

If you find the conspiracy as alleged and also find that these defendants were parties to it, then it is the law that the acts and declarations of any one of them in carrying out

the illicit agreement are admissible against and binding upon the others. But of course acts and statements of parties whom you may find were parties to the agreement are in no way binding upon other people whom you do not find were members of the conspiracy.

It is, therefore, necessary and important for you to carefully consider the whole testimony in the case with respect to each of the defendants on trial separately to determine whether he was a member, a party to this alleged illegal agreement and, therefore, whether any acts or statements of the others are binding upon each, each has the right to be tried as if he alone were on trial.

Now, I want to say a word about circumstantial evidence. There is quite a bit of testimony in this case that may be regarded as circumstantial, as distinguished from direct evidence. Direct evidence is where a witness says: I saw this, that or the other thing, and I know it personally; I was there or I heard it.

Circumstantial evidence is where you undertake to prove a fact as a deduction or inference from some other fact. There is a great deal of conflict, and always has been, as to the relative value of direct and circumstantial evidence. So far as the law is concerned, you can prove a case either by direct or circumstantial evidence.

Circumstantial evidence is that character of evidence which tends to prove a disputed fact by proof of other facts which has a legitimate tendency to lead the mind to a conclusion that a fact exists which is sought to be established. This is legal evidence and a jury must act upon it as if it were direct when it is satisfied beyond a reasonable doubt but to the extent that the government's proof in the case is circumstantial, those circumstances relied upon must be consistent with the guilt alone and not the balanced hypothesis of either guilt or innocence as I have told you.

There are a number of other requests that the defendants have made, and the government as well, some of which I will read to you or discuss. I think perhaps I have covered them pretty generally.

You must not draw any inference of guilt as to one or more of the defendants merely because all defendants are indicted and being tried together. I have told you that they

have the right to be tried as if they were separate and I will also say to you before you can find a verdict of guilty under the indictment, you must find it was one general agreement, not a series of different agreements.

The government says it was one agreement to do two things: Violate a law—that is, to give a Congressman compensation and the law says he cannot take it and the other one was to defraud the United States. The result of giving it to him would be that the government does not get the independent, impartial and unbiased services of a Congressman.

Mere association is not sufficient to warrant a verdict of guilty.

I was also asked to tell you, and I do, that Congressman May had a right, as any member of Congress would have, and that he, as Chairman of the House Military Affairs Committee had to make inquiries of various officers and agencies and to inquire about situations pertinent to the position and his duties as a member of the House Military Affairs Committee and so forth. None of that. I do not think, at the moment, of any single overt act alleged or proved which, in itself, was a thing that either by law or otherwise, he did not have a right to do; for instance, specifically telephoning Secretary Patterson, General Campbell. There is nothing illegal about that, in itself. What is illegal about it, if anything, is whether he did it for compensation. That is all.

That is why I told you earlier, really, that this case is as simple a case as you will ever be called upon to hear so far as the issue is concerned. That is all there is to it. He had a right to be in business. He had a right to be in the Cumberland Lumber Company. He had a right to do all these things. In and of themselves there is nothing wrong with them but they are all wrong if he did it for compensation and the government would only have to satisfy you that he did one of those things if you believe there was this illegal agreement. It isn't necessary to prove them all.

I am specifically asked to read this which I will do. It is pretty much what I have already said but I am asked to say this to you and I will.

The mere receipt of funds or moneys by Andrew J. May from either Erie Basin Metal Products, Inc., Batavia Metal Products, Inc., or Henry Garsson or Murray Garsson or any other person in behalf of the Cumberland Lumber Company did not of itself, standing alone, without more, constitute an unlawful act or conspiracy as charged in this indictment. That is all true. You consider those things together with all the other evidence in determining whether there was this unlawful agreement and whether compensation was paid to Mr. May while a member of Congress.

The same is true with respect to the fact that Congressman May acted as process agent. I am asked to call that to your attention and I do. Process agent for Cumberland Lumber Company in Kentucky—that means that every corporation formed out of a state must have what is called a process agent within the state so that, if somebody within the state wants to sue the corporation, there is a man there through whom it can be done by just serving a paper on him. There is nothing illegal or unlawful about that, in and of itself. It is one of those things you take into consideration, with all the other evidence, in determining whether it was done for compensation or whether it indicated he was the real owner of Cumberland Lumber Company, whether this was this agreement and so on.

The government has asked me in several requests to charge you also, one of which I have granted. That, gentlemen, for your information is Government's No. 12. I will read this as given to me.

If you believe that the defendants conspired to defraud the United States, or to violate Section 203 of Title 18, United States Code, as alleged in the indictment, and committed one or more of the overt acts to effect the object of the conspiracy, and if you further believe that the defendants violated Section 203 of Title 18, United States Code, as alleged in the third and fourth counts of the indictment,—if you believe that beyond a reasonable doubt, as I have defined the meaning of that,—you should convict the defendants, irrespective of what your conclusion may be as to the merits of the matters and things concerning which Mr. May contacted the War Department, and irrespective of what you believe as to the contributions, if any, of the defend-

ants, Henry Garsson and Murray Garsson, Erie Basin or Batavia, to the war effort.

For the Court charges you that the law is that if a member of Congress receives compensation, directly or indirectly, for services rendered or to be rendered to any person in any matter, in which the United States is directly or indirectly interested, before a government department, it is immaterial whether the matter pending before the department should or should not be decided favorably to the person in whose interest the congressman rendered or attempted to render services.

Likewise it is immaterial in this case whether or not the contracting corporations were good producers or bad producers, whether or not the "E" awards were merited or unmerited, whether or not the so-called freeze order should or should not have been entered in the first place or should or should not have been rescinded in whole or in part, whether or not Erie Basin or Batavia were improperly or properly restricted in manpower by the Manpower Commission, whether or not the corporations and their officers were discriminated against, whether or not the requests of the War Department in relation to personnel matters, if you believe such requests were made, were justifiable or not, whether or not Henry Garsson was an inventor of manufacturing processes or not, and whether or not the other matters and things testified about were properly or improperly decided by the officials of the War Department.

It was for these reasons that the Court restricted corroboration offered by the defendants and declined to permit the government to introduce evidence in rebuttal as to the facts concerning those various matters.

The Court charges you that in determining whether or not the defendants are guilty as charged in the several counts of the indictment, you should weigh and consider the testimony of Andrew J. May and Henry Garsson as to the motives they assigned for their action in contacting the War Department and causing Mr. May to contact the War Department as disclosed by the testimony in the case, and although it was probably made plain to you during the course of the trial, those are the reasons why that

evidence was offered and why it was limited in one sense on the part of the defendants and why the government was not permitted by the Court to introduce any evidence concerning it.

Its only competency in this case, those various things I have just gotten through talking about when I read the government's instruction, are competent only in order for you to determine whether you believe they were true at all, and if so, whether they or any one of them, all of them or any one of those various matters motivated Henry M. Garsson or Murray Garsson or their representative, Freeman, to go to May to get his help and if you believe that did occur and those situations were as represented by the defendants on the witness stand, and *if you believe* that that is what motivated them to go to Congressman May, then you will decide in your mind whether or not it had any effect, as he said it did, on him; any effect in the sense that it is what caused him, rather than compensation that he received, to make these contacts with the War Department and Manpower Commission and so forth and it is to be given no other consideration by you.

That is one of the things I had in mind when I said to you earlier that this case calls for a high degree of objectivity. It really does. That is one of the things about which you must be objective. It does not matter one iota except in respect of the thing I have just been talking about, whether the Garssons or those companies were the best producers in the land of munitions of war, or the worst; whether the War Department was *terribly* right or *terribly* wrong in any of the various controversies they said they had. It makes no difference in this case. It should not be permitted by you to affect your judgment at all except only if you believe that they were so and if you believe that is what caused the Garssons to go to May for help and if you believe that is why May gave them the help rather than for compensation.

Another thing that is immaterial is whether or not Congressman May made any money out of the Cumberland Lumber Company or he did not. The question is: Was it a vehicle and a medium by which he could receive some com-

pensation? If it was, then if he lost all the money given to him to put into it plus more of his own, it wouldn't make any difference in the world. Why was he in it? Was he in it as he tells you or was he in it as the government tells you? Look to the evidence for the purpose and the real reason for May's interest and by "interest in," I mean activity on behalf of the Cumberland Lumber Company but it doesn't make any difference and it makes no difference either, if those Cumberland moneys were received by May, it would make no difference that when the property was sold, all of it went back to the Garssons. That wouldn't make any difference either. It is what was the situation at the time the money was paid. Was it then paid as compensation for services either rendered or to be rendered in the future or was it, as the defendants say it was, the building of a new company in order to secure lumber which they needed and which was scarce?

Another thing I must comment upon—and I do not know how this got into the case any more. It is unfortunate that it did but it is in here and, therefore, I must talk to you about it briefly—suggestion has been made to you that the Mead Committee, Senator Mead and his Committee were motivated by political ambitions or for political reasons in making the investigation which that Committee did make—the Senate War Investigating Committee.

That calls for objectivity on your part. That has nothing to do whatever with this law suit. Even if the Mead Committee had set out with no purpose in mind other than the destruction of Congressman May for political reasons, it makes no difference. Why doesn't it make any difference? What counts is the evidence which you hear and the evidence which you have heard. That is what matters. That is all that matters. Not what the evidence was that the Mead Committee had.

You heard it here in the court room. You will decide where the truth of the matter lies. Don't let that affect you. Whether it is true or not, does not make any difference.

Another thing, there have been statements made that Congressman May never got a contract for the companies and that, as a matter of fact, he never really accomplished

anything for them. It does not make any difference whether he did or not, if his purpose in making the contacts was for compensation. That is all. We don't care whether he hit the mark or he missed it. It is whether he did it for that reason and that is the only thing you have got to decide.

One more thing and I think I am through except that I will ask you, when I conclude, to retire for a few minutes because I am sure the lawyers will either tell me I am wrong or I have forgotten something—and I usually do and they are usually right on one or the other of those points. It is this and nothing that I have thus far said is of greater importance.

You have been told by witnesses on the stand, Henry M. Garsson and Mr. May; it has been argued to you by Mr. Sawyer Smith and Mr. Perry Howard and Mr. Margiotti; that the defendants, the Garssons and Erie Basin and Batavia Companies, were discriminated against in the Chicago Ordance District because they were Jewish. Now, whether that is true or not, like these other things I have been talking about, is beside the point and it makes no difference except only, if you believe it was true and if you believe it motivated or was one of the things that motivated Henry or Murray Garsson or Freeman to go to May for his help and if you believe that it was one of the things that caused May to give his help and his services, then for that reason it is competent evidence.

It is limited to that but if anyone of you let the fact that two of these defendants are Jews influence you against them or for them, you will bring dishonor upon yourself and you will bring dishonor upon this Court. So remember that and I think you will have no trouble with that. Don't let yourselves stoop to a consideration as ugly and as foreign to this case except insofar as the limit of its area of admissibility and competency is which I have already described.

Now, gentlemen, I have run out but I am sure you haven't.

I will ask the jury to step out to the jury room for a few moments.

(Thereupon, the jury retired to the jury room at 4:28 o'clock p. m.)

* * * * * * *

(Thereupon, the jury returned to the courtroom at 5:15 o'clock p. m.)

The Court: Ladies and gentlemen, some things have been called to my attention and there were two instructions that I had said I would grant for the defendants and I can't remember whether I did or if I did whether I did it as I intended to. I think they were adequately covered but the first one of them is this:

Conviction cannot be had in this case on suspicion no matter however strong.

The other one is:

The jury must not speculate or guess on the guilt of any of the defendants.

It is thought possible that when I discussed with you the evidence which had to do with the sending of the proceeds from the sale of the Cumberland Lumber Company tract back to the Garrisons or the companies, or both, that I may have misled you and it is possible that I did. If I said so, I didn't mean it, that that has nothing to do with the case. If it hadn't anything to do with it, I would have stricken it out of the evidence long since. Of course, it was admissible on the question of who owned the Cumberland Lumber Company.

I am sure you must have understood that. I wasn't telling you to take it and use it for that purpose with whatever weight you want to give to it, either as proof that the Cumberland Lumber Company was owned by the defendant, Henry Garrison, or that it wasn't. You give it what weight you think it is entitled to, along with the other evidence, but it is destitute in the case on that question.

This I have neglected to say but I have told you so many times, I guess, I just forget it in this case.

You know, of course, that you are the sole judges of the evidence in the case but that you must take the law as given you by the Court and it is very important for you not to try to determine from anything I may have said or the way I

may have said it what my opinion of the evi dence is. Don't speculate on that any more than you specula ate on anything else because, even if I had an idea and had g iven an impression, it is not my business, so don't let that fa act, if you think there was any, by any chance, such impres sion given you, don't let it interfere or influence you or affec t your thinking and voting in the slightest degree.

I think I also made this clear but I may no t have and, just in case, I will repeat it.

In discussing the possible verdicts in the case, there are three counts in the case, as I have told you, a and the verdicts on all three of them, the possible verdicts on all three counts are—not guilty as to all defendants, each def fendant on each of the three counts; guilty as to each defend lant on all three counts and, as to Count 1, there is a furthe er possible verdict and this is true as to Counts 3 and 4 a lso. The other possible verdict is guilty as to one of the Ga arssons and not guilty as to the other Garrson and that is so in Counts 1, 3 and 4, but in no case in any of the counts, could you find either or both of the Garssons guilty and the Defendant, May, not guilty. In other words, if you find either of them guilty, you can only do so by also finding Co ngressman May guilty.

That covers them all, doesn't it?

Mr. Margiotti: I think you had covered it before.

The Court: I think so too.

Mr. Magee: A finding as to Congressman May's honesty ends the case because there would be no one else guilty as to these offenses, as I understand it.

The Court: That is right.

Mr. Magee: That ends the case.

The Court: That is right. I said that as clearly as I can imagine that it could be said.

Now, there is one other thing. I have come to the conclusion not to send into the jury room with you these exhibits, for these reasons: You then would have part but not all of the evidence in the case because you have got to depend on your recollection about the testimony that was given on the witness stand and I suppose every document that went in—definitely every document that went into evidence by either the Government or the defendants went in in the

context of testimony concerning that exhibit and, therefore, I think it is not right to let you have part of the evidence in the case when you cannot have it all so you will have to depend on your recollection about the entire case. But if you have any questions from time to time, you can write them out on a slip of paper, give them to the deputy marshal in charge who will give them to me and then I will take them up with counsel and see whether we can answer your question or not and I will tell you whether we can or not.

I have also concluded that it is not good to submit this case to you this evening at the end of a long day when, I am sure, you must be as weary as the lawyers and the reporters and the Judge,—I am sure the Clerk isn't weary. So I am going to let you go home and report tomorrow morning, and that includes you two alternate jurors. You will report tomorrow morning to the jury room that you have been using. Be there at nine o'clock in the morning. Don't discuss the case tonight with anybody under any circumstances, including yourselves. Don't discuss it tomorrow morning until—first I will have to bring you in in the morning and let the two alternate jurors go.

When the twelve of you are finally in the jury room, your first task, as you already know, is to select your foreman and then remember this that I have also told you from time to time: Proceed with some degree of formality but not too much of that, one extreme is as bad as the other, but don't let yourselves at any time get in the position where everybody is talking and nobody is listening; so (take it easy and you won't have any difficulty, I don't suppose.)

Be very careful tonight not to read the papers or to listen to the radio or talk with anybody about the matter and don't talk in the morning about it when you get together in there until you are finally there for the purpose of deliberating.

(Record of proceedings in the United States District Court for the District of Columbia, Volume #47, pages 6946 through 6989 and 7008 through 7013).

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 100

ANDREW J. MAY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 101

MURRAY W. GARSSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 102

HENRY M. GARSSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 159-176)[1] and dissenting (R. 176-187) opinions in the Court of Appeals have not yet been reported.

[1] "R." will be used herein to refer to the printed record, consisting of excerpts from the typewritten transcript of record on appeal, plus the proceedings in the Court of Appeals. References to the original typewritten transcript of record will be indicated by "Tr."

JURISDICTION

The judgments of the Court of Appeals were entered January 24, 1949 (R. 188), and petitions for rehearing were denied April 6, 1949 (R. 189-190). By orders dated April 20, 1949, and April 25, 1949, petitioners' time for filing petitions for writs of certiorari was extended by Mr. Justice Black to and including June 4, 1949 (R. 193-194), and the petitions were filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether a count charging conspiracy (1) to violate 18 U.S.C. [1940 ed.] 203 (making it unlawful for a member of Congress to accept compensation for services rendered in any matter in which the United States is interested) and (2) to defraud the United States, *inter alia,* of its right to the faithful and unbiased services of the member of Congress, is duplicitous.

2. Whether a count charging the receiver and the giver of the compensation, the receipt of which is proscribed by 18 U.S.C. [1940 ed.] 203, with conspiring to violate that statute is defective on the ground that the substantive offense itself necessarily requires "concert of action and agreement between the receiver and the giver"; and

whether, even if so, the point is material in this case in view of the fact that petitioners' sentences on the conspiracy count run concurrently with their sentences on the substantive counts.

3. Whether the one who gives the compensation, the receipt of which is made an offense by 18 U.S.C. [1940 ed.] 203, can properly be convicted of aiding and abetting the receipt.

4. Whether the evidence is sufficient to sustain the convictions.

5. Whether petitioners May and Henry Garsson obtained immunity from prosecution by virtue of their having testified before the Senate War Investigating Committee, prior to their indictment, concerning matters relating to the facts in this case.

6. Whether government exhibit 179, a stenographer's notebook, was unlawfully seized from petitioner Henry Garsson and erroneously received in evidence against him.

STATUTE INVOLVED

18 U. S. C. [1940 ed.] 203 provided in pertinent part:

> Whoever, being elected or appointed a * * * Member of * * * Congress, * * * shall, * * * during his continuance in office, * * * directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy,

charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; and shall moreover thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.

STATEMENT

Count 1 of a 4-count indictment (R. 2-17) filed in the District Court for the District of Columbia charged petitioners and one Freeman with having conspired, in violation of Section 37 of the Criminal Code (18 U. S. C. [1940 ed.] 88), "to commit offenses against the United States, that is, to violate Section 203 of Title 18 of the United States Code [*supra*], and to defraud the United States" (R. 2). The nature of the alleged conspiracy and the manner in which it was carried out were set forth in detail (R. 3-7) and 35 overt acts were alleged (R. 7-12). Count 3[2] charged petitioner May with having received a check for $5,000, in violation of 18 U. S. C. [1940 ed.] 203, *supra* (R. 14-15). Count 4 charged petitioner May with having agreed to receive sums of money totalling $53,634.07, in violation of the same statute (R. 15-

[2] Count 2 was identical with Count 3, except that the $5,000 involved therein was alleged in the former count to have been received in cash (R. 12-14). The Government elected to stand on the third count and abandon the second, as to which, accordingly, petitioners were granted motions for judgments of acquittal (R. 160).

17). Freeman and the petitioners Garsson were charged as aiders and abettors of May in counts 3 and 4 (R. 15, 16-17). Following a trial by jury, petitioners were found guilty on all three of the above counts and each was sentenced to imprisonment for from 8 months to 2 years on each count, the sentences to run concurrently (R. 151-153). Freeman was granted a judgment of acquittal on all counts (R. 160). On appeal to the Court of Appeals for the District of Columbia Circuit, petitioners' convictions were affirmed, one judge dissenting (R. 188).

The evidence adduced by the Government may be summarized as follows:

1. Petitioner Andrew J. May, throughout the period covered by the indictment (1942-1946), was a member of the House of Representatives and Chairman of the House Military Affairs Committee (Tr. 2343). Petitioner Henry Garsson was an officer and director of, and substantial shareholder in, two corporations, Erie Basin Metal Products, Inc., and Batavia Metal Products, Inc. (hereafter referred to as "Erie" and "Batavia," respectively) (Tr. 3641-3644). Petitioner Murray Garsson (Henry's brother) was an officer and director of both corporations (Tr. 810, 5853) and was also their Washington representative (Tr. 4473, 5228). The defendant Freeman was an assistant to Murray Garsson in his latter capacity (Tr. 5227-5228, 5246). Henry Garsson received annual salaries totalling $90,000 from Erie, Batavia, and a

subsidiary of the latter (Tr. 5072-5073). Murray Garsson received annual salaries totalling $55,000 from Erie and Batavia (Tr. 5011-5012). These two companies obtained approximately $78,000,000 in contracts from the War Department during the war (Tr. 3914).

May met Murray Garsson in 1941 (Tr. 2876), and they became close friends, addressing each other by their first names (G. Ex. 178, Tr. 3255). Murray Garsson and Freeman were often in May's office (Tr. 1082, 1693). May met Henry Garsson in 1942 (Tr. 3661), and in conversations with army officers May referred to Henry Garsson as his friend (G. Ex. 140, Tr. 1558; Tr. 1439, 1453).

2. *May's services to the Garssons and their corporations.*—Commencing in 1942 and continuing throughout the war, May intervened with the War Department many times, by letters, telephone calls and personal interviews, on behalf of the Garssons and their two corporations, Erie and Batavia. The evidence showed that May was constantly bringing pressure to bear on officials in the War Department to give war contracts to these companies (e.g., Tr. 1385-1389, 1439, 1479-1480, 1559-1560, 1579, 1784-1785, 1807-1809), protesting contract cancellations, terminations, and cut-backs (e.g., Tr. 1212-1214, 1220, 1229, 1259-1260, 1265, 1284, 1378-1381, 1417-1419, 1464-1467, 1558-1559, 2018-2019, 2136), interceding on behalf of the corporations in manpower disputes (Tr. 1583-1585, 1597-

1598, 1601, 1646, 1666, 1669-1671, 1794-1795, 1801), and the like.

In addition to his services on behalf of the corporations, the evidence showed that May interceded with the War Department and General Eisenhower in connection with a pending court-martial trial of Murray Garsson's son Joseph (Tr. 1702-1703, 1814-1815, 2058-2061); attempted to procure, on behalf of Freeman's son Albert, a furlough to this country from his overseas station (Tr. 1699, 1763, 2167-2168, 2172-2173); summoned a certain army officer to his, May's, office on numerous occasions to discuss with Murray Garsson and Freeman matters involving the transfer, promotion, and assignment of military personnel in whom they were interested (Tr. 1693-1694, 1698, 1738); interceded with Under Secretary of War Patterson in an effort to procure a commission for one Schwamm, a person in whom Murray Garsson was interested (Tr. 1919-1922, 1999-2001, 2022), etc.

3. *Evidence of May's ownership of the Cumberland Lumber Company.*—(a) In April 1943, May mentioned to Leroy Fields, Sr., a lifelong friend and constituent (Tr. 380, 385), that he "was interested in finding a good timber proposition" (Tr. 385). Fields advised May that a certain 2,200-acre tract in Letcher County, Kentucky, which was owned by the Mineral Development Company, could be purchased at $10 an acre (Tr. 386, 395). May told Fields that he had the backing of "big financial interests" from whom he could obtain the

necessary funds (Tr. 386, 567). They agreed that May would obtain the necessary capital for the purchase of this tract (Tr. 388); that a corporation would be organized, the stock of which would be owned equally by them (Tr. 388, 394, 395); and that Fields would manage the property (Tr. 411, 412).

On May 7, 1943, Mineral Development granted an option, covering the land in question, to May (G. Ex. 82, Tr. 1871; Tr. 1878). The option provided for the payment of $1,000 to Mineral Development at the time of execution (*ibid.*). On May 11, 1943, May transmitted to Mineral Development a cashier's check in the amount of $1,000 (G. Ex. 162, Tr. 1857; Tr. 1883). This check had been issued to one Raynes, who purchased the check at Murray Garsson's request and turned it over to the latter (Tr. 1909; G. Exs. 161-163, Tr. 1857). Mineral Development prepared a deed to the property, naming May as grantee, and sent May a copy for his approval (Tr. 2647-2648). At May's request, the grantee was changed to Cumberland Lumber Company, to which May said he was assigning the option (D. Ex. 67, Tr. 2647; Tr. 1876, 1982, 1983).

The purchase price of the land was $21,044.40. Henry Garsson delivered to Mineral Development a cashier's check in the amount of $10,044.40 as the second payment (G. Ex. 19, Tr. 189; Tr. 3685). To cover the $10,000 balance, four promissory notes of Cumberland Lumber Company, signed by Henry

Garsson as "President," each dated July 30, 1943, and in the amount of $2,500, were delivered to Mineral Development (D. Exs. 16, 59-61, Tr. 1965-1967).

(b) The Cumberland Lumber Company was incorporated on June 15, 1943 (G. Ex. 85, Tr. 2177; G. Ex. 170, Tr. 2211) and qualified to do business in Kentucky on August 5, 1943 (G. Ex. 86, Tr. 1096), May being designated as resident agent (G. Ex. 170, Tr. 2211). The corporation was organized by the Corporation Trust Company at the request of one Levin, a Washington attorney, deceased at the time of the trial (Tr. 1091, 1092). On June 15, 1943, Murray Garsson, Freeman, and Levin were named directors, but no stock was issued (Tr. 1094). On January 26, 1945 (G. Ex. 87, Tr. 1098) and again on March 1, 1945 (G. Ex. 88, Tr. 1099), the Corporation Trust Company wrote May for payment of its annual fee from Cumberland Lumber Company, stating in each letter that it had been informed by Levin that he, May, was the "only person interested in maintaining the life of this Corporation." May did not reply to either letter (Tr. 1098), but sent his personal check in payment of the fee on July 2, 1945 (G. Ex. 90, Tr. 1103).

(c) Contrary to the understanding reached with May, Fields never received any stock in the Cumberland Lumber Company. He continued to manage the timber project on a salary basis, however, until March 13, 1944, when May discharged him (G. Ex. 59, Tr. 485; Tr. 415, 488). During this

period, May wrote numerous letters to Fields concerning the affairs of the company and covering such subjects as the purchase of a mill (G. Ex. 37, Tr. 398; G. Ex. 41, Tr. 433; G. Ex. 43, Tr. 437), the location of a mill site (G. Ex. 38, Tr. 402; G. Ex. 51, Tr. 458), the cutting of mine timber (G. Ex. 43, Tr. 437; G. Ex. 44, Tr. 440), the construction of a log chute (G. Ex. 45, Tr. 442, 444, 445; G. Ex. 46, Tr. 445), etc. In various letters May urged Fields to sell certain timber while the price was high (G. Ex. 38, Tr. 402; G. Ex. 39, Tr. 408). In November 1943, May forwarded a letter which he had received from a certain company offering to purchase 200,000 feet of lumber at certain prices (Tr. 457), with the comment that the prices offered did not seem high enough (G. Ex. 50, Tr. 456). But in no instance did May ever instruct Fields to cut lumber for Erie or Batavia (Tr. 406, 407, 434).

May's son succeeded Fields as manager of the project until the former's death in June 1944 (Tr. 620, 637, 638). Then May's nephew, known as "Little Jack," was appointed manager by May on a salary basis (Tr. 606). He served in that capacity until December 1944 (Tr. 607). Lumber was sold during this period (Tr. 618), but at no time did "Little Jack" receive instructions from May to sell or store lumber for Erie or Batavia (Tr. 615, 618).

(d) On April 1, 1945, May and one Brown entered into an agreement whereby Brown would purchase the entire timber project from May for

$32,500, $5,000 to be paid on July 1, 1945, and the balance at the rate of $7 per thousand feet of timber manufactured (Tr. 658).[3] Pursuant to this agreement, Brown entered on the tract and expended considerable of his own funds for operations and equipment (Tr. 670-671). On May 25, 1945, however, May wrote Brown that he had conferred with "his associates" and that they had decided not to sell since they were users of large quantities of lumber (G. Ex. 64, Tr. 671). Previous to this, May had never informed Brown that any one other than himself had an interest in the property (Tr. 667, 668), and had dealt with Brown as if he, May, had been the sole owner (Tr. 669). Brown then demanded that May settle with him in regard to the $4,000 to $5,000 he had spent out of his own funds and take back the property (Tr. 674). May, however, told Brown to remain on the property, as he thought they could arrive at a satisfactory agreement (*ibid.*). Brown stayed on, cutting and selling lumber (Tr. 678). He did not store any lumber for Erie or Batavia (Tr. 679), however, nor did May ever mention those companies to him or any purchase orders from them (Tr. 673).

In the fall of 1945, one Burns offered May $50,000 for the property, which May was willing to accept (Tr. 691-692, 697). Brown, however,

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[3] On April 24, 1945, May wrote Franklin & Co., one of his lumber customers, that "I have sold the property which I owned on Cumberland River in Letcher County, Kentucky, and the new owner will take possession shortly" (G. Ex. 101, Tr. 649).

claimed an interest in the property by virtue of his previous agreements with May and his capital outlays, and May was unwilling to meet the figure Brown demanded by way of settlement (Tr. 694-695). As a result, the sale to Burns was never consummated (Tr. 717). Cumberland Lumber Company brought an ejectment action against Brown in March, 1946 (D. Ex. 21, Tr. 2624). Brown and May appeared at the hearing (Tr. 700) and May offered to settle for $40,000 in cash, Brown to get clear title to the land and all equipment (Tr. 700, 784). Brown accepted the offer and delivered a $40,000 draft to May (Tr. 792).

4. *May's receipt of funds, through the Cumberland Lumber Company, from the Garssons and their corporations.*—(a) On July 8, 1943, Erie issued a check in the amount of $10,000 to Murray Garsson (G. Ex. 3, Tr. 820). This was a "loan" to Murray Garsson, for which he gave his promissory note. Henry Garsson endorsed Murray Garsson's name on this check, and, on July 19, 1943, used the proceeds thereof to purchase a $10,000 cashier's check (G. Ex. 17, Tr. 189; Tr. 185, 192). This cashier's check, payable to Murray Garsson, was used by May on July 26, 1943, to open an account in the First National Bank of Prestonburg, Kentucky, in the name of the Cumberland Lumber Company (G. Ex. 27, Tr. 203; G. Ex. 17, 21, Tr. 202). The check, which had been delivered to May by Murray Garsson (Tr. 2668), bore the endorsements of "Murray W. Garsson" and "Cumberland

Lumber Co.," the latter endorsement being in May's handwriting (Tr. 183, 203). May alone was authorized to draw on the account (Tr. 202). The bank officer who received the deposit asked May who the directors of the Cumberland Lumber Company were and was informed by May that there were none as the company was "merely incorporated" (Tr. 201). May also advised the officer that no stock had been issued, and from the conversation the officer understood that Cumberland was owned by May and his family (Tr. 201, 239).

(b) On July 31, 1943, Erie issued a check in the amount of $10,000 to Henry Garsson (G. Ex. 4, Tr. 820). This was a "loan" to Henry Garsson, for which he gave his promissory note. Henry Garsson used the proceeds of this check to purchase a cashier's check, dated August 6, 1943, payable to himself in the amount of $10,044.40 (G. Ex. 19, Tr. 189). This cashier's check was used to make the second payment (see p. 8, *supra*) to the Mineral Development Company for the purchase by May of the timber tract in Letcher County, Kentucky (Tr. 3685).[4]

[4] In addition to the two $10,000 loans described in (a) and (b), *supra*, Erie had loaned the Garssons each $5,000 in the previous month, June, 1943, issuing a $5,000 check, dated June 6, 1943, to Henry Garsson (G. Ex. 1, Tr. 812) and another $5,000 check, dated June 7, 1943, to Murray Garsson (G. Ex. 2, Tr. 812). The four items, totalling $30,000, were carried by Erie on its books under a loan account until November 30, 1943, when they were charged as "an advance on materials due from Cumberland Lumber Co." (Tr. 820, 821). At the end of the company's 1944 fiscal year, the items were transferred to an inventory account (see pp. 17-18, *infra*) (Tr. 822).

(c) On January 27, 1944, Batavia issued a check in the amount of $5,000 to Cumberland Lumber Company (G. Ex. 8, Tr. 233), pursuant to the request of Henry Garsson, as "an advance on purchases" (Tr. 843). On February 2, 1944, May deposited this check in the Cumberland account in the First National Bank of Prestonburg, endorsing it "Cumberland Lumber Company" (G. Ex. 28, Tr. 233).

(d) On June 9, 1944, Batavia issued a check in the amount of $1,500 to the First National Bank of Batavia in payment of a draft in that amount drawn by May on Batavia in the name of the Cumberland Lumber Company (G. Ex. 9, Tr. 314; G. Ex. 11, Tr. 216). May himself received the proceeds of this draft (Tr. 214, 215). The Batavia comptroller was told by Henry Garsson to pay the draft as "it was an advance" to Cumberland for box lumber (Tr. 320-324).

(e) On July 3, 1944, Batavia issued a check in the amount of $2,500 to Cumberland Lumber Company (G. Ex. 12, Tr. 234) as an "advance on box lumber" (Tr. 326). On July 5, 1944, May deposited this check in the Cumberland account in the First National Bank of Prestonburg, endorsing it "Cumberland Lumber Company, A. J. May" (G. Ex. 29, Tr. 234).

(f) On August 18, 1944, Erie issued a check in the amount of $5,000 to Murray Garsson (G. Ex. 5, Tr. 359; Tr. 881, 882). This check, endorsed by

Murray Garsson and May, was cashed by May on August 22, 1944, and $4,000 of the proceeds was deposited in May's personal account in the National Bank of Washington, Washington, D. C. (G. Ex. 33, Tr. 359). Against this deposit May drew checks for personal expenses, including tuition, taxes, hotel rent, photographs, and association dues (Tr. 3021-3024). The total of these withdrawals was approximately $1,300 (Tr. 3024). In explanation, May testified that a few days after receiving the check in question he was asked by Levin, the attorney who incorporated the Cumberland Lumber Company (deceased at the time of the trial), to pay his fee and that he wanted it in cash (Tr. 2684); and that he gave $1,300 in cash, which he had in a lock box in his office, to Freeman to deliver to Levin (Tr. 2684, 3024). Freeman testified that he received the money from May and delivered it to Levin (Tr. 6010-6013). However, neither Levin's cash book (G. Ex. 187, Tr. 6222) nor his income tax return for 1944 (G. Ex. 186, Tr. 6244), which the Government introduced in evidence in rebuttal, reflected the receipt by Levin of such a fee.

It was the $5,000 check described in (f), *supra,* on which count 3 (R. 14-15) of the indictment was predicated.

(g) On November 18, 1944, Erie issued a check in the amount of $3,156.47 to Cumberland Lumber Company (G. Ex. 6, Tr. 222). On December 11, 1944, May deposited this check in his personal

checking account in the First National Bank of Prestonburg (G. Ex. 23, Tr. 222). This amount represented the difference between the total amount of certain invoices of Cumberland to Erie for alleged lumber purchases ($33,156.47) and the $30,000 originally carried by Erie as "loans" to the Garssons but later charged as "an advance on materials due from Cumberland Lumber Co." (see footnote 4, *supra*, p. 13) (Tr. 815-816). The invoices were marked "paid" following payment of this check (Tr. 815).

(h) On March 9, 1945, Batavia issued a check in the amount of $1,850 to Cumberland Lumber Company (G. Ex. 14, Tr. 224). On March 14, 1945, May deposited this check in his personal checking account in the First National Bank of Prestonburg (G. Ex. 24, Tr. 224). Against this deposit May drew checks for payment of sundry personal expenses, such as a department store bill, hotel bill, income taxes, etc. (Tr. 3014-3017).

(i) On July 2, 1945, Batavia issued a check in the amount of $4,627.60 to Cumberland Lumber Company (G. Ex. 15, Tr. 229). On July 7, 1945, May deposited this check in his personal account in the Prestonburg Bank (G. Ex. 25, Tr. 229). May also drew checks against this deposit for personal obligations (Tr. 3027-3028).

5. *The fictitious transactions of the Cumberland Lumber Company with the Garssons' corporations.*

(a) *Erie.*—On October 29, 1943, Erie issued its

purchase order No. 7117 to the Cumberland Lumber Company for designated quantities of box lumber (G. Ex. 103, Tr. 824). The order contained the following statement: "The $30,000 paid you [see *supra,* pp. 12-13, and footnote 4] shall be considered an advance payment against this order and lumber shall be stored for our account until dry and pending shipping instructions." At the time of the issuance of this order, the mill on the Cumberland timber tract had not yet been erected (Tr. 458). Neither Fields, who managed the Cumberland project until March 1944 (*supra,* p. 9) nor May's nephew, "Little Jack," who managed it from June to December 1944 (*supra,* p. 10), ever saw this order (Tr. 437, 610). May himself testified he never saw it until the trial and knew nothing about it (Tr. 2845, 3116). Glick, an Erie official, was "certain" that the order was delivered to Henry Garsson rather than sent to Cumberland (Tr. 830). The Government introduced in evidence a purchase order from Erie to another company, bearing the same number and date as that issued to Cumberland (G. Ex. 104, Tr. 887), which the evidence showed was genuine and legitimate (Tr. 925-930).

The $30,000 in "loans" advanced to the Garssons by Erie in June and July 1943 (*supra,* pp. 12-13, and footnote 4) had, at the end of the fiscal year 1943, been charged on Erie's books as "advances" on purchases (Tr. 830). Glick, prior to the date of the 1944 closing of the books, inquired of Henry

Garsson several times whether the item should be treated in the books as in the previous fiscal year, or whether there would be an invoice and evidence of delivery of the material (Tr. 830). In November 1944, Henry Garsson delivered three invoices of Cumberland to Glick, stating that the lumber was being stored for Erie at Whitesburg, Kentucky (Tr. 816, 830, 831, 834). The invoices were dated October 11, October 23, and November 2, 1944 (G. Exs. 105-107, Tr. 825-827), and totalled $33,156.47. A check for $3,156.47 (balance above the $30,000 in "advances") was then made out (G. Ex. 6, Tr. 222) and was eventually received by May (see pp. 15-16, *supra*). The invoices were then marked "paid" (Tr. 815). No lumber, however, was ever delivered to Erie under these invoices (Tr. 825, 831).

(b) *Batavia.*—In February and March 1944, Batavia issued to Cumberland two purchase orders for lumber (G. Exs. 109, 110, Tr. 849). The Government introduced in evidence a Cumberland invoice to Batavia, dated March 29, 1945, in the amount of $10,850 (G. Ex. 108, Tr. 933). As of that date Batavia had made four "advances" to Cumberland, totalling $10,850 (G. Exs. 8, 9, 12, 14, Tr. 233, 314, 234, 224; see (c), (d), (e), and (h), *supra,* pp. 14, 16). In November 1945, O'Connor, a Batavia employee, was instructed by Henry Garsson to insert in Batavia's inventory book a sheet indicating that, as of April 30, 1945, there

was a lumber inventory of $10,850 (Tr. 939). Garsson told O'Connor that the purpose of this was to have "a page in there in the same handwriting as the rest of the inventory to show to the [Senate War Investigating] Committee" (Tr. 940). O'Connor did as instructed (G. Ex. 111A, Tr. 941). No lumber, however, was ever delivered to Batavia under this invoice (Tr. 1051, 1073).

ARGUMENT

1. Petitioners contend (May Pet. 34-35; Henry Garsson Pet. 47-51; Murray Garsson Pet. 14-15) that the conspiracy count is duplicitous because it charges that the object of the conspiracy was twofold, *i.e.*, to violate 18 U.S.C. [1940 ed.] 203 and to defraud the United States. We submit that the contention is without merit. "Countenance we believe has been given by some Courts to the notion that a single count in an indictment for conspiring to commit two offences is bad for duplicity. This Court has given it none. [Citing cases.] The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk* v. *United States*, 249 U.S. 204, 209-210; *Braverman* v. *United States*, 317 U.S. 49, 54; *Pinkerton* v. *United States*, 328 U.S. 640, 642-643; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664.

This is not a case in which the substantive offense alleged to be an object of the conspiracy charged—for example, theft from an interstate

shipment—bears no logical relation to defrauding the United States, with which it is linked as an objective of the conspiracy. On the contrary, violation of 18 U.S.C. [1940 ed.] 203—prohibiting a member of Congress from accepting compensation for services rendered in any matter in which the United States is interested—bears an obvious relation to defrauding the United States of its right to the faithful and unbiased services of a member of Congress and officers of the War Department, the defrauding charged (R. 3-5). Consequently the conspiracy charge here is analogous to the conspiracy charge in the *Manton* case, *supra* (conspiracy to obstruct the administration of justice, in violation of 18 U.S.C. [1940 ed.] 241, and to defraud the United States of its right to the faithful and unbiased services of a federal judge), and is clearly not duplicitous.

2. The dissenting judge below was of the view that the conspiracy count in this case is defective for a further reason. His reasoning and conclusion are stated in the following passage of his opinion (R. 180):

> The offense against the United States, violation of 18 U.S.C. § 203 (1946) [*supra*, pp. 3-4] which the defendants are in Count I charged with having conspired to commit is one requiring, from its very nature, concert of action and agreement between the parties involved. The offense is receipt of compensation by a member of Congress for services rendered or

> to be rendered. But receipt of compensation cannot be accomplished without compensation also being given and requires therefore concert of action and agreement between the receiver and the giver. This being so, it is not legally possible to make the commission of such an offense the subject of a conspiracy charge. It is like charging a conspiracy to conspire.

Petitioners now adopt this argument (May Pet. 35-37; Henry Garsson Pet. 54-61; Murray Garsson Pet. 9-12). We submit, however, that the reasoning of the majority opinion below on this issue (R. 165-167) is the sounder, and that there are several answers to the dissenting judge's argument.

(a) In the first place, the argument would seem to be squarely refuted by Mr. Justice Holmes' statement in *United States* v. *Holte,* 236 U.S. 140, 145, that "a conspiracy with an officer or employe of the government or any other for an offence that only he could commit has been held for many years to fall within the conspiracy section, now § 37 of the penal code [citing cases]." See also *Ex parte O'Leary,* 53 F. 2d 956, 957 (C.A. 7), certiorari denied, 283 U.S. 830.

(b) Secondly, it does not follow, we submit, from the fact that there cannot be a receiver of compensation without there also being a giver, that to accuse the giver and the receiver with conspiring to violate a statute which prohibits the

receipt of compensation under specified conditions "is like charging a conspiracy to conspire." True, the receipt of compensation necessarily implies the giving thereof, and the receipt and giving will normally be preceded by agreement. But to charge the two actors in the transaction with conspiring to effect the recipient's act of receiving is not the same thing as to charge them with conspiring to enter into this agreement. 18 U.S.C. [1940 ed.] 203 (the statute which petitioners were charged with conspiring to violate), it is to be observed, itself proscribes both receiving and agreeing to receive (*supra,* pp. 3-4). If count 1 had charged a conspiracy to commit the latter offense (agreeing to receive), the dissenting judge's criticism of the count might have merit. Manifestly, however, it was the former offense (receiving) that was charged as the object of the alleged conspiracy.

(c) Thirdly, *United States* v. *Dietrich,* 126 Fed. 664 (C. C., D. Neb.), on which the dissenting judge relies in this respect (see R. 180-184), involved a charge of conspiracy to violate a statute which specifically proscribed both the receipt and the giving of compensation for certain forbidden purposes (as well as agreement to do either). The decision is therefore distinguishable from the present case, which involves a substantive statute that is silent in respect of giving.

(d) Fourthly, even if the dissenting judge's point were otherwise well taken, the fact remains

that the conspiracy charged by count 1 had for its purpose not only the violation of a specific statute but also the defrauding of the United States (*i.e.*, of and concerning its right to the unbiased services of Congressman May and officials in the War Department (see R. 3-5)). And, as observed by the majority below (R. 167), "the United States can be defrauded without concert of action."

(e) Finally, even if it were true that the conspiracy count is defective for the reasons assigned by the dissenting judge, and even if the alleged conspiracy "merged" in the substantive offenses alleged in counts 3 and 4, as petitioners urge in a cognate contention (May Pet. 35; Henry Garsson Pet. 54), the judgments of conviction still could not be successfully assailed. Each petitioner received an identical sentence of imprisonment under each count, and all sentences were directed to be served concurrently. It is settled law that under such circumstances any good count will sustain the sentences imposed. *Hirabayashi* v. *United States,* 320 U. S. 81, 85; cf. *Pinkerton* v. *United States,* 328 U. S. 640, 641-642, note 1.

3. Petitioners Henry Garsson (Pet. 61-66) and Murray Garsson (Pet. 12-14) further contend that they were improperly charged and convicted on the two substantive counts, 3 and 4, because the statute on which those counts were based (18 U. S. C. [1940 ed.] 203, *supra,* pp. 3-4) denounces only the improper receipt of compensation for services rendered, and does not make criminal the giving of

such compensation.[5] But they, as givers of the compensation, certainly aided and abetted May's receipt thereof, as count 3 [6] charged (R. 15). Under 18 U. S. C. [1940 ed.] 550,[7] therefore, they were equally guilty with May and in fact principals in May's offense.[8] This statute, as remarked by the majority below (R. 167), "provides that whoever aids or abets the commission of any act constituting an offense defined in any law of the United States, is a principal in the offense. No language in the statute before us [*i.e.*, 18 U. S. C. [1940 ed.] 203] makes an exception to that general provision. To sustain appellants' contention, we would have to write, or read, such an exception into the otherwise unqualified general statute dealing with aiders and abettors. We think we cannot do that."

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[5] Petitioner May also argues this point (Pet. 37-39), but since he comes squarely within the proscription of the statute on which counts 3 and 4 are founded, the argument clearly cannot avail him. The dissenting judge below seems to have concluded otherwise (R. 186-187), but we submit that his reasoning on this point does not support the conclusion reached.

[6] Count 4 charged May with "agree[ing] to receive" specified sums in compensation for services rendered, and the Garssons with aiding and abetting such "agreement" (R. 15-17). For the sake of simplicity, only count 3 will be considered in this connection. This is permissible, as we pointed out at p. 23, *supra*, since the sentences on these two counts are identical and run concurrently.

[7] "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

[8] It is well settled that, though a person may be incapable of committing a particular crime, he still may aid and abet its commission and hence be liable as a principal. *Gebardi* v. *United States*, 287 U.S. 112, 120-121, footnote 5; *Barron* v. *United States*, 5 F. 2d 799, 802 (C.A. 1).

It is true that a person's *mere acquiescence* in another's crime, which by its nature cannot be committed without such acquiescence, does not render the person so acquiescing punishable either as a principal or co-conspirator. Thus, it was held in *Gebardi* v. *United States,* 287 U. S. 112, that a woman who is the willing object of a transportation which violates the Mann Act, but who does not aid or assist in the transportation otherwise than by her consent, is not properly chargeable either as a principal in the offense or as a co-conspirator with the principal in its commission. Similarly, "It is not to be supposed that the consent of an unmarried person to adultery with a married person, where the latter alone is guilty of the substantive offense, would render the former an abettor or a conspirator, * * * or that the acquiescence of a woman under the age of consent would make her a co-conspirator with the man to commit statutory rape upon herself." *Id.,* at p. 123. But where there is something more than mere acquiescence—as, for example, where the willing woman in a Mann Act case "should suggest and carry out [the] journey * * * in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare * * *"—it is settled that there is no legal obstacle to charging the necessary partner in the criminal venture either as an aider and abettor or as a co-conspirator. *United States* v. *Holte,* 236 U. S. 140, 145; cf. *Gebardi* v. *United States, supra,* at 117. We submit that the instant case is one that

is clearly outside the scope of the *Gebardi* decision and the adultery and statutory rape cases considered in that opinion.[9] Nor, we think, does it come within the principle of those cases (see *Gebardi* v. *United States, supra,* at 119) which hold that the purchaser of liquor is not to be regarded as an abettor of the illegal sale. The question is essentially one of the intent of Congress, and, as the opinion of the court below makes clear (R. 167-168), the legislative history of the statutes here concerned does not support the inference that Congress had an unspoken intent to make the active aiding and abetting of the offense proscribed by section 203 of Title 18 an exception to the provisions of section 550 of that title. An intent which may reasonably be imputed to Congress where the question is whether a purchaser of a bottle of liquor from a bootlegger is to be punished as severely as the bootlegger himself cannot reasonably be inferred as to the immensely more serious and dangerous acts here concerned. It is equally unrealistic to liken one who pays a Congressman compensation for service rendered—compensation which it is criminal for the Congressman to accept—and thereby procures vast financial advantages at the expense not only of his competitors but of the nation itself, to the acquiescent female victim in the Mann Act,

[9] The *Gebardi* decision, it is to be noted, was based solely on the Court's belief that "the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent" evidenced "an affirmative legislative policy to leave her acquiescence unpunished" (287 U.S. at 123).

adultery and statutory rape cases with which the *Gebardi* decision was concerned. He clearly does more than "merely acquiesce" in the recipient's offense; he actively aids and abets the commission of the offense.

It is argued, however, that Congress' failure specifically to denounce the giving of compensation in 18 U. S. C. [1940 ed.] 203 evidences an intent to leave the giving unpunishable notwithstanding the aider-and-abettor statute. The fact that a related statute, 18 U. S. C. [1940 ed.] 202 (proscribing the receipt of money or other consideration by members of Congress and others for procuring any contract or appointive office for any person), specifically denounces both the receipt and the giving of such consideration is pointed to as further evidence of such a congressional intent. Concededly, as the majority below observed (R. 168), there would be some force in this argument "if the two sections had been adjoining sections in the same original congressional enactment." But, as the majority also pointed out (*ibid.*), such is not the case. The two sections adjoined in the Criminal Code of 1909 (§§ 112 and 113) and in the Revised Statutes (§§ 1781 and 1782), but were originally enacted on different occasions—the one on July 16, 1862 (c. 180, 12 Stat. 577; amended February 25, 1863, c. 61, 12 Stat. 696) and the other on June 11, 1864 (c. 119, 13 Stat. 123).

4. Petitioners all challenge the sufficiency of the evidence to sustain their convictions (May Pet. 10-

11, 40; Henry Garsson Pet. 24; Murray Garsson Pet. 7). The Government's proof of the existence of the conspiracy charged, however, was, we submit, clear and compelling. The evidence summarized in the Statement, *supra,* at pp. 5-19, is by no means exhaustive, but it suffices to show that the trial court was plainly warranted in submitting the case to the jury. That the evidence was circumstantial is of course not a valid criticism of its sufficiency, since the existence of a conspiracy, from the very nature of the crime, can rarely be established by direct proof. *United States* v. *Manton,* 107 F. 2d 834, 839 (C. A. 2), certiorari denied, 309 U. S. 664. The evidence under substantive count 3 is also clearly sufficient (see paragraph (f), *supra,* pp. 14-15), and there is no occasion to demonstrate the sufficiency of the proof under the other substantive count, 4, since each petitioner's sentence on the latter count is identical with his sentence on the former, and runs concurrently with it.[10]

5. Petitioners May and Henry Garsson both testified before the Senate War Investigating Committee (the so-called Mead Committee), prior to their indictment, concerning various matters relating to the facts in this case. May testified voluntarily. Henry Garsson appeared under subpoena,

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[10] We mention the substantive counts in this connection, notwithstanding that each petitioner's sentences on all counts are identical and run concurrently, for the reason that violation of 18 U.S.C. [1940 ed.] 203, on which the substantive counts are predicated, renders the offender incapable thereafter of holding "any office of honor, trust, or profit under the Government of the United States"—a disability not incurred as a result of conviction on the conspiracy count.

and, it appears, "made a general statement claiming and refusing to waive 'his constitutional privilege' [against self-incrimination]" (R. 164, 161-162). Nevertheless, Henry Garsson "did not refuse to answer any question; so far as the record shows, he was not compelled" (R. 164). These petitioners now contend that, by virtue of their having testified before the Committee, they automatically obtained immunity from prosecution for the offenses of which they have been convicted (May Pet. 30-32; Henry Garsson Pet. 68-74). The contention is clearly without merit.

There is no statute, applicable to testimony before a congressional committee, comparable to those involved in *Smith* v. *United States,* No. 292, 1948 Term, decided May 31, 1949, and *United States* v. *Monia,* 317 U. S. 424, whereby self-incriminating testimony may be compelled, and in exchange, as it were, for such deprivation of what would otherwise be a constitutional right, there is conferred immunity from prosecution "for or on account of any transaction, matter, or thing" concerning which testimony is given. These petitioners' attempt to "spell out" such immunity from two statutes—28 U.S.C. [1946 ed.] 634 [11] and 2 U.S.C. [1946 ed.] 192 [12]—is

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[11] "No testimony given by a witness before either House, or before any committee of either House, * * * shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

[12] "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony

patently futile. The former is simply what it purports to be—a statute forbidding the use of a witness' testimony before a congressional committee in any subsequent criminal proceeding against him; it does not confer immunity from prosecution. *Counselman* v. *Hitchcock,* 142 U.S. 547, 564-565, 585-586. The latter makes it an offense to refuse to divulge pertinent information to a congressional committee; but it cannot constitutionally be construed, by virtue of the bar of the Fifth Amendment, to apply to self-incriminating testimony. *Counselman* v. *Hitchcock, supra.* In fact, it is precisely for the purpose of compelling self-incriminating testimony that immunity statutes have been enacted. *Smith* v. *United States, supra; Shapiro* v. *United States,* 335 U.S. 1, 28-29; *Brown* v. *Walker,* 161 U.S. 591, 594-595. And, as we have indicated, no such statute has been enacted relative to testimony before a congressional committee. Consequently, neither May nor Henry Garsson could have been compelled to incriminate himself before the Mead Committee. Indeed, the fact that Henry Garsson stated to the Committee that he was not waiving his constitutional privilege against self-incrimination shows that he was well aware of that fact. This case, therefore, simply

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or to produce papers upon any matter under inquiry before either House, * * * or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine * * * and imprisonment * * *."

does not involve any question of immunity.[13]

6. Petitioner Henry Garsson contends (Pet. 79-83) that a certain stenographer's notebook (G. Ex. 179, Tr. 5909) was erroneously received in evidence. He charges that it was his personal property and was unlawfully seized without a warrant. The contention is clearly without merit.

The notebook in question was one of a large number of items taken by agents of the Government from Batavia Metal Products, Inc., pursuant to a subpoena *duces tecum* directed to that company. The items were voluntarily surrendered by attorneys for the company. Some of the items subsequently proved to be personal property of Henry Garsson and were returned to him. Others, including the notebook in question, were not re-

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[13] A related contention of petitioners May (Pet. 32-34) and Henry Garsson (Pet. 73-74) is that "testimony given" by them before the Mead Committee was used against them in this prosecution, in violation of 28 U.S.C. [1946 ed.] 634 (quoted in pertinent part in footnote 11, *supra*, p. 29). However, neither refers to any specific testimony given by him before the Committee and allegedly used by the prosecution against him in this case, and in fact there was none. It is not true that "It has never been denied by the prosecution that [May's] testimony [before the Committee] was used before the grand jury" (May Pet. 33). On the contrary, the prosecution categorically denied this charge, made in connection with several pre-trial motions attacking the indictment (R. 38; see also Transcript of proceedings on February 21 and 25, 1947, pp. 109-111). Both these petitioners also suggest (May Pet. 33; Henry Garsson Pet. 73-74) that some of the evidence presented by the Government to the grand jury resulted from "leads" obtained from their testimony before the Committee. It is not necessary, however, to consider whether, even if this were true, it was forbidden by the statute in question, since in each instance the suggestion is sheer speculation.

turned for the reason that they were corporate property of Batavia and hence properly received under the subpoena. (See Transcript of proceedings on April 3 and 9, 1947, pp. 53-81.) There can be no doubt that this notebook was corporate property and contained notes of corporate business. See Henry Garsson's testimony on cross-examination at the trial (Tr. 4458-4462). It was therefore properly taken pursuant to the subpoena. *Wilson* v. *United States,* 221 U.S. 361.

We have thus far discussed and answered what we consider to be the principal contentions of the petitions for certiorari. Petitioners make a number of other contentions, but to answer each in detail would unduly lengthen this brief in opposition to certiorari. We think it is unnecessary to do so. Each of the remaining contentions is carefully examined and rejected in the majority opinion below, which in our judgment fully demonstrates their lack of merit. None of these contentions, moreover, was found meritorious by the dissenting judge, whose opinion was based entirely on what he thought were defects in the indictment (R. 176). We have already discussed each of these alleged defects. For the convenience of the Court, we set forth below the nature of petitioners' additional contentions, references to the pages of the petitions in which they are made, and references to the majority opinion where they are considered:

(1) Alleged illegal constitution of the grand jury (May Pet. 39-40; Henry Garsson Pet. 75-78; Murray Garsson Pet. 15-16); considered below at R. 164.

(2) Refusal to strike all the evidence concerning the acquitted codefendant Freeman (May Pet. 43-45; Henry Garsson Pet. 84-85); considered below at R. 169.

(3) Exclusion of evidence as to alleged discrimination by the War Department against the Garssons' companies, the excellent production records of the companies, the functions of the Military Affairs Committee, justification of the complaints made to May by the Garssons, etc. (May Pet. 46-49); Henry Garsson Pet. 97-104); considered below at R. 172-173; see also R. 170.

(4) Alleged errors in admitting evidence (Henry Garsson Pet. 86-96); considered below at R. 169-170.

(5) Alleged errors in the charge and refusal to grant certain requested instructions (May Pet. 49-51; Henry Garsson Pet. 112-123); considered below at R. 176.

(6) Alleged unfairness of the trial (May Pet. 51-52; Henry Garsson Pet. 105-111); considered below at R. 173-175.

CONCLUSION

The petitions for writs of certiorari do not, in our opinion, present any question requiring further review by this Court. We therefore respectfully submit that they should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 100

ANDREW J. MAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

REPLY BRIEF FOR PETITIONER, ANDREW J. MAY

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SEPTEMBER 23, 1949.

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REPLY BRIEF FOR PETITIONER, ANDREW J. MAY

Under "Questions Presented" respondent states that there are six principal questions presented and no other questions than those summarized in this section of respondent's Brief are discussed except by way of reference to the Court of Appeals decision (Br. 33). We feel it our duty to challenge the accuracy of numerous statements contained in respondent's Brief.

Reply to Respondent's Statement

In respondent's "Statement" (Br. 4-19) the same technique is adopted that was used by the prosecution. Numerous isolated facts and half truths are taken out of their context for the purpose of having this Court draw inferences

therefrom not justified by the evidence. We propose to illustrate what we mean by this statement. Thus, respondent (Br. 6) states that the Erie and Batavia Companies "obtained approximately Seventy Eight Million Dollars in contracts from the War Department." Then two paragraphs below on the same page respondent states "May was constantly bringing pressure to bear on officials in the War Department to give war contracts to these companies." These statements are certainly put in respondent's Brief for the purpose of having this Court infer that petitioner had some responsibility in procuring the mentioned Seventy Eight Million Dollars in war contracts. Yet the evidence shows just the opposite and that no contract was ever obtained by either the Erie or the Batavia Companies through any intercession by petitioner. The trial court so ruled after the prosecution had concluded its case and the prosecution never questioned the accuracy of this ruling.

Respondent (Br. 7) states May "summoned a certain Army officer to his (May's) office on numerous occasions." The inference which respondent seeks to have this Court draw is that May was summoning an officer from the War Department to his office for discussions. The fact of the matter is that the officer in question had offices *in May's suite* in the House Office Building and the so-called summoning amounted to no more than May asking questions of this officer *in that office.*

In the same paragraph it is stated that May interceded with the Secretary of War in an effort to secure a commission for one Schwamm. The simple fact was that Mr. Schwamm had been recommended for a commission by Mrs. Roosevelt, as petitioner testified and offered to prove, and that all he did was arrange an appointment for Schwamm concerning this matter.

Under the heading "Evidence of May's Ownership of Cumberland Lumber Company," after reviewing certain

items in the evidence, respondent states (Br. 12) "Brown accepted the offer and delivered a $40,000 draft to May." Respondent omits to advise the Court that *this $40,000 draft was payable to the Cumberland Lumber Company and was delivered by petitioner to Dr. Henry Garsson as the owner of the Cumberland Lumber Company and was cashed by Henry Garsson and disbursed by him.* Mr. May never received any part of this check. Certainly in making this statement respondent wants this Court to infer that petitioner received and kept this $40,000 draft of Brown.

Further, under the heading "May's Receipt of Funds, Et Cetera," respondent states (Br. 13) that "this cashier's check (for $10,044.40, G. Ex. 19) was used to make the second payment to the Mineral Development Company *for the purchase by May* [1] of the timber tract in Letcher County * * *." This check was not used by petitioner at all. If the Court will refer to page 8 of the Government's Brief, it will find that this cashier's check for $10,044.40 was delivered by Henry Garsson to the Mineral Development Company as the second payment for the purchase of the land by the Cumberland Lumber Company. Such a misleading statement certainly is not very helpful to this Court in determining the actual facts as shown by the evidence.

Respondent states (Br. 14) "May himself received the proceeds of this draft" (a $1500 draft drawn on Batavia by the Cumberland Lumber Company, Gov. Ex. 11). The undisputed evidence pertaining to this situation was that while May cashed the draft he did so accompanied by an employee of the Cumberland Lumber Company, "Little Jack" May and his wife, Mrs. May, who was assisting "Little Jack" in his work for the company. "Little Jack" and his wife then took the $1500 and used it to pay pay-rolls of the Cumberland Lumber Company and to pay outstanding

[1] The italicized portion of this sentence is untrue as this timber tract was never purchased *by May,* but by the Cumberland Lumber Company.

bills of the company. Not one cent of the proceeds of this draft was retained by petitioner.

Respondent states (Br. 15) "against this deposit (deposit of $4,000 out of a $5,000 check of Murray Garsson, Gov. Ex. 5) May drew checks for personal expenses, et cetera." The evidence showed that at the time petitioner did this, the Cumberland Lumber Company was indebted to him for advances which he had made and that petitioner's action was simply a reimbursement to himself for such advanced funds. (May Petition 10-11.)

Respondent states (Br. 15) that the $1,300.00 payment made to Levin and testified to by two witnesses, May and Freeman, was disputed because Levin failed to include such a payment in his cash book or in his income tax return. Such evidence, of course, was objected to and was incompetent for such a purpose, as Levin was deceased and not available for cross-examination. Levin was a lawyer. His "records" were loosely kept. Such "records" were not admissible under the "Federal Shop Rule." *New York Life Ins. Co.* v. *Taylor,* 147 F. 2d 297, 300-301, following *Palmer* v. *Hoffman,* 318 U. S. 109-115. It might be interesting for this Court to know that this was the only item of all the disbursements made by May that the prosecution even attempted to question. No competent testimony disputed the accuracy of the statement of account made by petitioner showing the disbursement by him of all funds in question, not to himself, but for the use and benefit of the Cumberland Lumber Company, a corporation in which all the stock was owned by Dr. Henry Garsson, and which corporation owned the Letcher County timber lands described in the evidence.

Respondent (Br. 15-16) states "May deposited" a check for $3,156.47 payable to Cumberland (Gov. Ex. 6) in his personal account in Prestonsburg, that he did the same

thing with a check in the amount of $1,850.00 (Gov. Ex. 14) and with a check in the amount of $4,627.60 (Gov. Ex. 15), both payable to Cumberland. These statements are inaccurate and highly misleading. These checks had been endorsed by the Cumberland Lumber Company and in order that they might be treated as cash, petitioner had personally endorsed them, as they were needed by Cumberland for expenses and bills past due. When received by the cashier of the bank in Prestonsburg without deposit slips, instead of depositing them to the Cumberland account, the cashier deposited these checks to petitioner's account. The cashier gave as his reason for doing this that Mr. May was the last endorser and, therefore, the checks were deposited in May's account. Respondent also neglects to point out that the proceeds of these checks were fully accounted for by petitioner and were disbursed entirely for the use and benefit of the Cumberland Lumber Company.

Under the heading "The Fictitious Transactions of the Cumberland Lumber Company, Et Cetera," respondent summarizes (Br. 16-18) evidence pertaining to activities which occurred outside the presence of petitioner and of which he had no knowledge, pertaining to certain bookkeeping transactions of the Erie and Batavia Companies, and of Cumberland. The evidence summarized in this section of respondent's Brief clearly shows the type of inadmissible, incompetent and hearsay evidence which the courts below erroneously permitted to be used against petitioner to his prejudice. The use of such evidence deprived petitioner of a fair trial under all counts of the indictment.

As we read respondent's Brief our Summary Statement is not questioned by respondent. We, therefore, respectfully suggest that our Summary Statement be compared with respondent's Statement. This comparison will show how inaccurate and highly misleading respondent's Statement is.

Reply to Respondent's Argument

1. Our argument is not as respondent states (Br. 19) that Count I is duplicitous because it charges that the object of the conspiracy was twofold. Our contention is that the indictment is duplicitous because it charges two separate conspiracies. The Statute punishes in the disjunctive one or the other of two separately described conspiracies. The indictment charges both of these conspiracies. Since the Statute describes two conspiracies (and this was the theory on which the jury was instructed), an indictment which charges the commission of both in a single count is duplicitous. Not one of the cases cited by respondent touches this subject with the possible exception of the *Manton*[2] case. We note in its argument that the respondent studiously avoids any reference to Rule 8(a) of the Criminal Rules of this Court forbidding such practice. Moreover, the *Manton* case does not discuss the point urged by us.

2. We have great difficulty in following the Government's attempt to distinguish (Br. 22) a conspiracy to conspire and a conspiracy to do the act which the conspiracy calls for. No authority is cited for such a distinction and there is no basis in law or logic for making it. Where the substantive offense requires an agreement, that is, a conspiracy, and the Statute punishing the offense punishes only one party to such an agreement, there is no legal or logical basis for penalizing, under a general conspiracy Statute, the very agreement which Congress specified as criminal. The effect of this is to add an additional punishment and to punish additional persons other than those prescribed by Congress. *2 Wharton, Criminal Law,* Section 1339.

As Wharton puts it:

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy * * * cannot be

[2] *United States* v. *Manton,* 107 F. (2d) 834.

maintained. * * * In other words, when the law says 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is not lawful for the prosecution to call it by some other name; and * * * it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy."

We again submit that the reasoning of the Chief Justice below in his dissent is sound, logical and follows the decisions of this Court in the *Gebardi*,[3] *Katz*[4] and *Pinkerton*[5] cases.

As we pointed out in our Petition (p. 37), the *Gebardi* case cites with approval the *Dietrich*[6] case which shows that this Court never intended in the *Holte*[7] case to restrict the *Dietrich* case. Our contentions are not met by the respondent's quotation from the *Holte* case (Br. 21). Mr. Justice Holmes in that case was not considering the problem here involved at all. There are many situations in which there might be a conspiracy with an officer or employee of the Government for doing something in violation of a law punishing only the official. Such cases do not control where the criminal act is of such a character that it cannot be performed by the officer alone. The *Dietrich* case cannot be disposed of as simply as the respondent wishes. On the contrary, the instant case on the facts is even stronger than the *Dietrich* case, because here Congressional intent that only the Congressman and not the payer of compensation should be punished is clear. In an effort to bolster its tenuous argument, respondent states (Br. 23) that in any event the United States can be defrauded without concert of action. In making this contention, respondent completely ignores the fact that the trial court charged the jury

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[3] *Gebardi* v. *United States*, 287 U. S. 112, 121-122.
[4] *United States* v. *Katz*, 271 U. S. 534.
[5] *Pinkerton* v. *United States*, 328 U. S. 640, 643.
[6] *United States* v. *Dietrich*, 126 F. 644, 667.
[7] *United States* v. *Holte*, 236 U. S. 140.

that petitioners could be convicted under the first count if they conspired *either* to violate Section 203 *or* to defraud the United States. Obviously, if one part of the indictment was invalid, a conviction based upon such a charge cannot be sustained, as no one could know on which aspect of such a charge the jury based its conviction. (*Stromberg* v. *California,* 283 U. S. 359, 368; *Maryland* v. *Baldwin,* 112 U. S. 490, 493.)

Respondent (Br. 23) next argues that even if Count I is defective and even if this count is merged in the substantive offenses charged in Counts III and IV, as each petitioner received an identical sentence to be served concurrently, any good count will sustain the sentences. The difficulty with this argument is that a great mass of so-called conspiracy evidence was received under Count I. In fact, the great bulk of respondent's evidence pertains to so-called overt acts relating to Count I. Such evidence obviously is not admissible to prove the substantive offenses alleged in Counts III and IV. (*Glasser* v. *United States,* 315 U. S. 60, 73-75.) This evidence was not only submitted to the jury as proof under Count I, but was also used as evidence under Counts III and IV. As improper evidence was introduced under Count I and was utilized under Counts III and IV, which renders the verdicts on both of these counts invalid, this argument can avail respondent nothing. (*Krulewitch* v. *United States,* 69 S. Ct. 716, 718, 719-723; *Stromberg* v. *California, supra; Maryland* v. *Baldwin, supra.*)

3. In trying to sustain the convictions under Counts III and IV, respondent (Br. 25-26) seeks to make a distinction between various degrees of participation in a criminal act, and argues that a person who "merely acquiesces" cannot be held as an aider and abettor, but a person who "actively participates" becomes such aider and abettor. We find no warrant for such a tenuous distinction in the statute. We submit that no such distinction has been approved by the

cases on this point. It is true that in some cases dealing with the subject, courts speak about acquiescence and consent, but certainly in two of the examples [8] cited by respondent (Br. 25), one being where a woman agrees to become the willing object of an illegal transportation in violation of the Mann Act, and the other being the consent of an unmarried person in the commission of adultery, more than mere acquiescence or consent is involved. It is hard to conceive of a woman becoming a willing object to such a transportation and thus not assisting in the transportation. Certainly, it is hard to conceive of the commission of an act of adultery without something more than mere acquiescence. Yet, both Justice Holmes in the *Holte* case and Justice Stone in the *Gebardi* case held under such circumstances that such persons could not be prosecuted as aiders and abettors. In support of this alleged distinction, the Government again refers to the *Holte* case. The discussion of Justice Holmes in the *Holte* case pertaining to the possibility that the woman might be a blackmailer was made in connection with the argument that the statute was made for her protection and, therefore, the possible victim could never be charged as a criminal. Justice Holmes' discussion actually had nothing to do with the point made here that the woman in such circumstances could not be held as an aider and abettor. The indictment in the *Holte* case charged a conspiracy, not aiding and abetting, so the question under discussion here was not involved in that case.

In replying to our contention that as Congress did not denounce and punish the giving of compensation, the giver of compensation cannot be charged with either conspiracy or aiding or abetting, as both of these elements are necessary and inherent parts of the offense, respondent, while conced-

[8] The third example "statutory rape" seems so far removed from our problem as to not merit discussion. Hence we ignore it, though in principle it supports our contention.

ing there would be some force to this argument if the two sections had been adjoining sections, states (Br. 27) this is not the case. We commend the reasoning of Chief Justice Stephens in his dissenting opinion in reply to this argument. It seems crystal clear to us that had Congress intended in enacting the statute under consideration to punish the giver of compensation, it would have done so in simple language as it did in the bribery statute. These two acts were passed in less than a year of each other originally and were adjoined in the Criminal Code of 1909 and in the Revised Statutes.

Under these circumstances we submit that Congress did not intend to punish the giver, and excluded the giver from punishment by the terms of the act. Therefore, it is unlawful for the prosecution to attempt to punish the giver indirectly by charging him with conspiracy or with aiding and abetting. Accordingly, all counts below were fatally defective and, certainly, in view of the evidence that was received thereunder, the conviction of petitioner was erroneous and cannot stand.

4. Respondent next states (Br. 27-28) that all petitioners question the sufficiency of the evidence to sustain the convictions below. In answer to our detailed discussion of this point, respondent studiously avoids any reference to *Glasser* v. *United States*, 315 U. S. 60. In that case this Court held squarely that so-called admissions and statements which are in the same category as hearsay acts, including overt acts, cannot be used to establish a conspiracy until there is proof *aliunde* of the existence of the conspiracy and proof *aliunde* connecting the party making the statement or doing the hearsay act with that conspiracy. In arguing this point below, respondent admitted that such evidence was so used but argued that it was quite proper to prove a conspiracy by admissions, statements and overt acts and no such in-

dependent proofs were needed. Respondent further argued that the *Glasser* case did not hold what we contend it held and then cited the *Glasser* case *in the Circuit Court of Appeals.* The decision below adopted this argument and permitted the evidence to be so used, and stated that the *Glasser* case did not hold what we said it did. In support of this contention, the Court of Appeals cites the *Glasser* case *in the Circuit Court of Appeals.*[9] As we pointed out in our Petition for Rehearing, the decision of the Circuit Court of Appeals in the *Glasser* case was reversed by this Court (315 U. S. 60) with this Court holding (p. 73-75) that such evidence could not be used to prove the conspiracy. The flat refusal of the courts below to follow this Court's ruling in the *Glasser* case should be corrected.

Respondent states (Br. 28) that there was "proof of the existence of the conspiracy" and makes reference to the evidence summarized in respondent's Statement (5-19) as evidence proving such conspiracy. That evidence does nothing of the sort. A study of the evidence summarized on pages 5 to 19 of the respondent's Brief, shows that all of this evidence pertains to alleged overt acts, that is, things done in pursuance of a conspiracy *and after* it is charged to have been formed. The conspiracy is charged to have commenced on the 1st day of January, 1942.[10] The earliest overt act described in the indictment (paragraph 12) is alleged to have occurred on April 18, 1942.[11] This necessarily presupposes the formation of a conspiracy prior to April 18, 1942 and this was the theory of the prosecution's case. All evidence described in respondent's Brief pertains to overt acts. As it was conceded that each and every overt act was legal in itself, the existence of the conspiracy was left to

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[9] Record on Certiorari, p. 170.
[10] Record on Certiorari, p. 2.
[11] Record on Certiorari, p. 9.

speculation. It is still left in that state and respondent has never been able to refer to any independent evidence in this record establishing the conspiracy or establishing petitioner's connection with it. And there is no such evidence. The evidence pertaining to alleged overt acts which is summarized on pages 5 through 19 of respondent's Brief is not available to prove the conspiracy itself.

We submit that since respondent failed to establish the existence of a conspiracy or an agreement between the parties as charged in the indictment, there was insufficient evidence to take the case to the jury and certainly insufficient evidence to support a conviction. As the trial court and the court below refused to follow this Court's decision in the *Glasser* case, departed from it, violated that decision to the prejudice of petitioner, this Court should exercise its powers of correction to assure that justice will be done in the present case.

In this connection we wish to point out that respondent studiously avoids any discussion of the evidence pertaining to the acquitted co-defendant Freeman. Respondent merely refers (Br. 33) to the decision below on this point. As we pointed out in our Petition, as Freeman was acquitted and was never the agent, servant or employee of petitioner, the Freeman evidence should have been stricken and the presence of this evidence in the record deprived petitioner of a fair trial (May Petition 43-45).

5. Respondent next admits (Br. 28) that petitioner and Henry Garsson testified before the Senate War Investigating Committee prior to their indictment "concerning various matters relating to the facts in this case." Respondent then argues that petitioner and Henry Garsson did not obtain immunity because they were not compelled to give the testimony which they did. The argument of the respondent and the decision below on this point are difficult to understand.

This Court has ruled in the *Smith* [12] and *Monia* [13] cases that it is not necessary for a witness each time a question is asked to raise the constitutional question involved and then be forced to answer before immunity attaches in the giving of testimony to a Congressional Committee. The argument of the Government that there was no comparable statute involved in the *Smith* and *Monia* cases is fallacious. A mere reading of the statutes involved and comparing them with the statute here will show their similarity.

Next respondent makes the curious argument (Br. 30) that no information can be compelled by Congress of a witness under the statutes here involved if a person raises the constitutional question. And yet, using the very statutes here involved, respondent is indicting, trying and convicting numerous witnesses before Congressional Committees for contempt who have refused to answer questions put to them by such Committees in reliance upon their constitutional right. Such an argument under such circumstances should not be considered seriously by this Court. It offends one's sense of fair play and justice. What the Solicitior General is saying is that 2 U. S. C. 192, is unconstitutional. We always thought it the duty of the Solicitor General to uphold the constitutionality of an Act of Congress and not to urge, when he is faced with a plain provision of an Act forbidding certain conduct which a Federal prosecution has indulged in, that the prohibition of the statute is unconstitutional. The question is one of importance and in view of the novel position taken by the Solicitor General should be settled promptly in the public interest and in the proper administration of justice.

Respondent does not discuss any of the other points raised in our Petition. Respondent contents itself with the state-

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[12] *Smith* v. *United States*, No. 292, 1948 Term, decided May 31, 1949.
[13] *United States* v. *Monia*, 317 U. S. 424.

ment (Br. 32) that our contentions were rejected in the majority opinion and were not found meritorious by the dissenting Judge. We question the latter part of this statement, the reason being that the dissenting Judge did not even consider these points, as his decision held the indictment and the convictions thereon invalid. It was, therefore, unnecessary for the Chief Justice to consider the other points raised. We submit that such fundamentally important questions cannot be thus "whistled down the wind." The important points presented by our Petition, we submit, require a more candid and impartial treatment than has been afforded in respondent's Brief.

Conclusion

It is respectfully submitted that the Petition herein should be granted and the judgment below reversed.

WARREN E. MAGEE,
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Washington, D. C.,
Attorneys for Petitioner.

September 23, 1949.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 100

ANDREW J. MAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR REHEARING

WARREN E. MAGEE,
DANIEL J. ANDERSEN,
Munsey Bldg.,
Washington, D. C.

OCTOBER 24, 1949.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 100

ANDREW J. MAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR REHEARING

Petitioner, Andrew J. May, respectfully prays that a rehearing be granted on his Petition for Writ of Certiorari in this cause, that his Petition be reconsidered and that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming (the Chief Justice dissenting) a verdict of guilty on three counts of an indictment (R. 159.)

Jurisdiction

Rule 33 of the Rules of this Court, as amended October 13, 1947, Section 2, provides for the filing of a petition for rehearing on orders on petitions for writs of certiorari.

This petition is timely filed under that rule. This Court has stayed its order in this cause pending the filing and determination of this Petition for Rehearing.

Brief Statement of Grounds

(I) Intervening circumstances of substantial or controlling effect have occurred since the filing of the Petition for Writ of Certiorari in this case and (II) other substantial grounds not fully and previously presented justify a rehearing and a reconsideration in this case.

I

Since the filing of our Petition this Court granted certiorari in *United States of America* v. *Fleischmann*, No. 98, October Term, 1949, and *United States of America* v. *Bryan*, No. 99, October Term, 1949, on petitions the Solicitor General. The Solicitor opposed our petition in this case.

The *Fleischmann* and *Bryan* cases involve the same statutes as are involved here. Particularly R. S. § 102, as amended, 2 U. S. C. 192 (Pet. 98, 99, pp. 2-3) (Pet. 100, p. 27). In answer to our contention that immunity must be given in exchange for testimony to Congressional Committees, the Solicitor General argued (Br. pp. 29-30) "There is no statute applicable to testimony before a Congressional committee * * * whereby self-incriminating testimony may be compelled * * *." Our attempt to "spell out" such immunity from 28 U. S. C. 634 and 2 U. S. C. 192 is characterized as "patently futile" (Br. pp. 29-30.) In other words the Solicitor General is saying that these statutes are unconstitutional and no testimony can be compelled. This means compulsion by subpoena and the threat of criminal contempt proceedings under the Solicitor General's argument cannot be had lawfully to compel the giving of testimony to Congress.

Now let us compare that position with the Solicitor General's position in the *Fleischmann* and *Bryan* cases. In those cases he cites R. S. 102, 2 U. S. C. 192, (Pet. 88, 89, pp. 2-3) under which respondents were convicted of criminal contempt, and seeks to uphold these convictions (which were reversed in the Court of Appeals). He does not confess error because 2 U. S. C. 192 is unconstitutional as he argued in our case, but argues that the construction of this statute "involves a novel and important aspect of committee procedure which should be settled by this Court." (Pet. 98, 99, p. 8.) In our case this statute, its constitutionality, its effect when witnesses testify, *even under subpoena, and after self-incrimination is claimed,* the Solicitor General argues does not "present any question requiring further review by this Court." (Br. p. 34.)

Yet to construe this statute and congressional committee action under it "as involving • • • and important *aspect* of congressional committee procedure" this Court granted certiorari in the *Fleischmann* and *Bryan* cases.

Hence we pose the question. If the construction of one aspect of the statute is so important as to warrant certiorari in cases Nos. 98 and 99 does not its more important and broader aspects, including *the constitutionality of this very statute,* and related ones, their administration by Congress and the Department of Justice also present sufficient grounds for certiorari? Is it to be said, that only the Solicitor General is entitled to certiorari involving these questions in cases *he has lost,* but that citizens convicted thereunder are not. We think not and therefore seek a rehearing and a reconsideration of our petition in this case. We submit a rehearing should be granted. (*Sanitary Refrigerator Co.* v. *Winters,* 291 U. S. 34, footnote 1).

II

Other substantial grounds available to petitioner have not been fully presented though mentioned (Reply Brief p. 13).

Congressional Committees are daily issuing subpoenaes to witness, calling witnesses and are seeking testimony from such witness. See *Fleischmann* and *Bryan* Petitions and Briefs. Also *Lawson* v. *United States,* No. 248; *Barsky* v. *United States,* No. 766; *Marshall* v. *United States,* No. 197; *Morford* v. *United States,* No. 236; *Trumbo* v. *United States,* No. 249; October Term, 1949, of this Court. These latter cases all seek certiorari under the statutes we have been considering.

We have always contended that these statutes to be constitutional must grant immunity from testimony given, before any witness can be compelled to give testimony to Congress. The United States in our case has contended no such immunity is given and a witness should just refuse to answer and take his chances on contempt charges.

But petitioner, Mr. May, and petitioner, Henry Garsson in case No. 102, when faced with these statutes, gave their testimony to the Senate Committee. They then were tried and convicted for substantive crimes about which they gave testimony. They believed that they gave that testimony to aid Congress in considering any necessary remedial legislation in exchange for immunity.

This question is inherent in all Congressional investigations, the issuance of summonses, the giving of testimony, and precedes quorum questions.

Now let us analyze the Solicitor General's "attitudes" on these vital questions of first impression. In our case no "exchange theory" was accepted. He argued that no one can be compelled to testify if the privilege is claimed (Br. 29-30).

Let us examine the Solicitors General's "attitude" in the *Lawson, Trumbo, Barsky, Marshall* and *Morford* cases now pending in this Court. In these cases the respondents appeared before a Congressional Committee, questions were put to them by the Committee. The respondents refused to produce certain records and answer certain questions. They stood on their "constitutional rights." The United States indicted and convicted respondents *under* R. S. 102, 2 U. S. C. 192, (our "unconstitutional statute") and now the Solicitor General is defending those convictions.

Let us examine briefly his arguments in cases *won* by the United States below. He states (Br. 236, p. 11):

"The Committee's power of inquiry, * * * was very broad, and the evidence sought came within the scope of the inquiry," He concludes the convictions below were valid and rested upon a valid statute and Resolution of Congress. His argument in these cases when coupled with his argument in the *Fleischmann* and *Bryan* cases, is "refusal * * * deprived Congress of pertinent information in aid of its legislative function." Hence those who refuse can be convicted of contempt. Is this not arguing that the statute is constitutional and witnesses can be compelled to testify and if they refuse they must go to jail? Is not this clear from his Brief in Nos. 248, 249, p. 18, where he states: Constitutional rights "are not absolute?" "They never have been thought to preclude compulsion to testify. The power to compel testimony for public purposes—legislative * * * is essential to the existence and operation of organized society." Contrast this with the Solicitor General's arguments in our case.

We submit our case presents problems involving "novel and important aspects of congressional committee procedure which should be settled by this Court." It now appears that the Solicitor General has *actually* advanced

this ground as a basis for certiorari under the same statute. As this Court granted certiorari on that ground we submit that certiorari should be granted here in the proper administration of Congressional procedure, criminal procedure and in the interests of fair play and justice. (*United States* v. *Fleischman*, No. 98 and *United States* v. *Bryan*, No. 99, October Term, 1949)

WHEREFORE, this petition having been duly considered it is respectfully prayed that this Petition for Rehearing be granted and our original Petition reconsidered and a Writ of Certiorari be granted to bring before this Court the divided decision and judgment of the United States Court of Appeals for the District of Columbia Circuit.

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October 24, 1949.

Certificate

Counsel for petitioner certifies that this Petition for Rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds specified in Rule 33, Section 2, of the Rules of this Court.

WARREN E. MAGEE,
Of Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 101.

MURRAY W. GARSSON, *Petitioner,*

v.

UNITED STATES OF AMERICA.

No. 102.

HENRY M. GARSSON, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

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IN THE

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OCTOBER TERM, 1949.

No. 101.

MURRAY W. GARSSON, *Petitioner,*

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No. 102.

HENRY M. GARSSON, *Petitioner,*

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UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Murray W. Garsson and Henry M. Garsson, Petitioners, respectfully pray for a rehearing and reversal of the orders hereinbefore entered on the 10th day of October, 1949, denying their Petitions for Writs of Certiorari to the

United States Court of Appeals for the District of Columbia and as grounds for such rehearings set forth the following:

I.

That two of the principal questions presented for decision by this Court concerned the interpretation and construction of two groups of statutes: (a) R. S. 1782, March 4, 1909 c. 321 Section 113, 35 Stat. 1109, as amended (18 U. S. C. A. 203) and, (b) R. S. 102, as amended June 22, 1938, c. 594, 52 Stat. 942 (2 U. S. C. A. 192); R. S. 103, as amended June 22, 1938, c. 594, 52 Stat. 942 (2 U. S. C. A. 193), and R. S. 859, as amended June 22, 1938, c. 594, 52 Stat. 943 (28 U. S. C. A. 634). 18 U. S. C. A. Section 203 prohibits a Congressman from receiving or agreeing to receive any compensation for services in any matter in which the United States is interested. The statutes in group (b) pertain to testimony given by a witness before a Congressional Committee.

The Petitions for Writs of Certiorari in the above cases raise many questions of substance relating to the interpretation, construction or application of said statutes, were denied. It may be that this action was taken on the ground that there was no conflict of decision among the various Courts of Appeals relative thereto. Although the importance of the questions relative to these statutes was presented in the Petitions, petitioners did not argue that prosecutions elsewhere with the resulting conflict of decision was improbable because such statutes would be most likely to be violated only in the District of Columbia. Because of the concentration of Governmental departments, bureaus and agencies in the District of Columbia, and of the time spent by members of Congress in said District, it is most probable that 18 U. S. C. A. Section 203, if violated, would be violated in that District. Also, because of the existence of the foregoing facts, Congressional investigations will be held most probably in said District rather than elsewhere in the United States.

This Court's attention is called to the fact that this case was the first prosecution by the Government under 18 U. S. C. A. 203 of a person other than a Congressman, against whom the prohibition of that Section is specifically directed. There is no decision by this Court on the question whether any one other than a Congressman may be indicted under 18 U. S. C. A. 203 as an aider and abettor. In the absence of the probability of a conflict of decision in other Courts of Appeal, and in view of the probability that such prosecutions will be brought only in the District of Columbia, it is important to the administration of justice that this Court grant certiorari in these cases in order that an important question of Federal administration be decided and settled.

The preceding ground for rehearing constitutes a substantial ground, which was available to petitioners although not previously presented in their Petitions for Writs of Certiorari. Said ground is analogous to that presented in the petition for rehearing in the case of *Schriber-Schroth Company* v. *Cleveland Trust Company,* 305 U. S. 47, 573; 59 S. Ct. 810, in which this Court granted certiorari on a petition for rehearing showing that, notwithstanding the doubtful validity of certain patents, "litigation elsewhere with the resulting conflict of decision was improbable because of the concentration of the automobile industry in the 6th Circuit."

II.

That a further reason for granting a rehearing is an intervening circumstance of substantial and controlling effect —that since the filing of the Petitions on June 3, 1949, the Supreme Court, on June 27, 1949, in the case of *Eugene Dennis, Petitioner* v. *United States of America,* at No. 436, October Term, 1949, granted a Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia, limited to the question whether Government employees could properly serve on the jury which tried the petitioner.

This decision by this Court bears on the question presented in petitioners' briefs (Henry M. Garsson Brief, 75-79, Murray W. Garsson Brief, 15) whether the petitioners were indicted by an illegally constituted Grand Jury. The Court of Appeals in summarily rejecting petitioners' challenge of the composition of the Grand Jury on the ground that is consists of more than half of Government employees, and that two of its members were completely disqualified, followed the decision in *Frazier* v. *United States,* 335 U. S. 497, that Government employees are eligible to sit as jurors.

The Court of Appeals in the *Dennis* case, 171 Fed. (2d) 986, 991-992, upheld the District Court's action in overruling the challenge of all talesmen who were Government employees. Petitioners maintain that the granting by this Court of certiorari in the *Dennis* case shows a departure from its decision in *Frazier* v. *United States,* 69 S. Ct. 201. This Court's action shows a growing apprehension and realization of the obstacles to a fair trial presented by a petit jury composed principally of Government employees. This Court's attention is also called to dissenting opinions by Judges Jackson, Frankfurter, Douglas and Murphy in the *Frazier* case. Mr. Justice Jackson particularly pointed out the danger of a "packed jury" where the offense was against no one except Federal Government policy, i.e. the Secretary of the Treasury. Judge Jackson, in his dissenting opinion, states, 69 S. Ct. 201, 210:

> "On one proposition I should expect trial lawyers to be nearly unanimous: that a jury, every member of which is in the hire of one of the litigants, lacks something of being an impartial jury. A system which has produced such an objectionable result and always tends to repeat it, should, in my opinion, be disapproved by this Court in exercise of its supervisory power over federal courts."

The dangers inherent in the Grand Jury investigation and in the trial of cases in the District of Columbia involv-

ing offenses against no one except Federal Government policy—[in these cases, particularly against the General Accounting Office]—make it impossible for defendants charged with such offenses to receive a fair trial in said District at the hands of either a Grand Jury or a petit jury composed largely of Government employees. The Mead Committee investigation, which preceded the Grand Jury investigation and the trial itself, publicized unsworn and rash statements made by members of the investigating committee. The publicity given to the Mead Committee hearings was so widespread that no one in the District of Columbia at that time could have been ignorant of the charges made against these defendants. Comments made by members of the Committee were powerful enough to prejudice both the Grand Jurors and the petit jurors against these defendants before the trial even started.

Objections were made in these cases to the composition of both the Grand Jury and the petit jury. Said juries had a one-sided outlook on the case before them. The petitioners were deprived of a fair and impartial trial not only because they were tried by a jury, most of those members were prejudiced against them, but also by jurors whose minds could not have helped but be biased against the petitioners as a result of comments made during the Mead investigation.

In view of this Court's action in granting certiorari in the *Dennis* case, limited to the question whether Government Employees could properly serve on the jury which tried petitioner therein, petitioners in the above cases maintain that there is more reason for granting certiorari in their cases—because in the *Dennis* case at least the defendant had the opportunity to examine the petit jurors for possible bias. Such an opportunity was not available in the case of the Grand Jury which indicted our petitioners.

III.

That a further reason for granting a rehearing as to petitioner Henry M. Garsson is that since the filing of his Petition, the Government in its brief (Br. 28-31) admits that petitioners May and Henry Garsson both testified before the Senate War Investigating Committee prior to their indictment concerning various matters relating to the facts in this case, that Henry Garsson appeared under subpoena, and, "made a general statement claiming and refusing to waive 'his constitutional privilege' (against self-incrimination)" (R. 161-162, 164). Although the Government contends that the two statutes involved, 28 U. S. C. A. 634 and 2 U. S. C. A. 192 do not "spell out" immunity from prosecution "for or on account of any transaction, matter, or thing" concerning which testimony is given before a Congressional Committee, nevertheless it does stress that Henry Garsson "did not refuse to answer any question; so far as the record shows he was not compelled" (R. 164). The Government's position is thus most inconsistent. It recognizes by the last statement that the statutes do grant immunity; otherwise it would not have had to argue that Henry Garsson "did not refuse to answer any question" after he had made a general statement claiming and refusing to waive his constitutional privilege. Respondent argues that Henry Garsson did not obtain immunity because he was not compelled to give the testimony which he did. This argument and the decision in the Court below on this point are difficult to understand.

This Court has ruled in *Smith* v. *United States*, 292 1948 Term decided May 31, 1949, 69 S. Ct. 1000, and in *United States* v. *Monia*, 317 U. S. 424, that it is not necessary for a witness each time a question is asked to raise the constitutional question involved and then be forced to answer before immunity attaches in the giving of testimony before a Congressional Committee. The Government's argument that the statutes herein relied on to give petitioner Henry Garsson immunity—28 U. S. C. A. 634, and 2 U. S. C. A.

192—are not comparable to the statutes involved in the *Smith* and *Monia* cases is fallacious.

Next the respondent argues that no immunity statute has been enacted relative to testimony before a Congressional Committee and that, consequently, neither May nor Henry Garsson could have been compelled to incriminate himself before the Mead Committee, if he raised the constitutional question. And yet in two recent cases, wherein Petitions for Writs of Certiorari are pending in this Court, *Lawson* v. *United States* and *Trumbo* v. *United States*, 176 Fed. (2d) 49 (C. C. A. D. C.) the Government brought prosecutions for violations of 2 U. S. C. A. Section 192, 52 Stat. 942 (1938), which makes it a misdemeanor to refuse to answer "any question (of a Congressional Committee) pertinent to the question under inquiry". Thus, using the very statutes herein involved, respondent indicted, tried and convicted for contempt witnesses before Congressional Committees, who, in reliance upon their constitutional right, refused to answer questions put to them by such Committee.

The position of the Solicitor General in upholding the constitutionality of 2 U. S. C. A. 192 in the *Lawson* and *Trumbo* cases and, in effect, attacking the constitutionality of the same statute in our cases because it is not an immunity statute within the so-called definitions of the *Smith* and *Monia* cases, presents a question of importance in the administration of Federal criminal justice which should be decided by this Court.

Petitioner Henry Garsson maintains that he comes within the protection given by this Court to the defendant in the *Smith* case, because it is plain that he relied from the beginning of his examination upon his privilege against self-incrimination. The United States had notice that the witness sought protection against prosecution for any facts to which he was compelled to testify. As stated by this Court, 69 S. Ct. 1000, 1007: " . . . Although the privilege against incrimination must be claimed, when it is claimed

it is guaranteed by the Constitution. Thereafter only absolute immunity from Federal criminal prosecution is sufficient to compel the desired testimony . . . "

This is the first time the Supreme Court has been called upon to pass upon the immunity of a witness, who has testified before a Congressional Committee after refusing to waive his constitutional rights.

Previous cases before the Court have involved immunity before other governmental bodies or juries.

A witness before a congressional committee, under the statutes can not refuse to testify even on the grounds of self-incrimination.

He may be prosecuted for contempt if he refuses to testify, and he may be prosecuted for perjury if he should testify falsely.

IV.

That respondent, in its Brief (Br. 23), argues that even if the conspiracy count is defective for the reasons assigned by the dissenting Judge in the lower Court and even if the conspiracy count is "merged" in the substantive offenses charged in Counts 3 and 4, the judgments of conviction still could not be successfully assailed because each petitioner received an identical sentence of imprisonment under each count, and all sentences were directed to be served concurrently. The Government argues that under such circumstances any good count would sustain the sentences imposed. The difficulty with this argument is that a great mass of so-called conspiracy evidence was received under Count 1—the so-called overt acts related to Count 1. This evidence, which was not admissible to prove the substantive offenses alleged in Counts 3 and 4 (*Glasser* v. *United States,* 315 U. S. 60, 73-75), was not only submitted to the jury as proof under Count 1, but was also used under Counts 3 and 4. Thus, assuming that Count 1 was defective, the petitioners were prejudiced by the jury's being

permitted to consider the testimony erroneously admitted under Count 1 as to all the counts in the indictment.

V.

That in its Brief (Br. 27-28), respondent answered petitioners' contention that the evidence was insufficient to sustain the convictions by making a sweeping statement that the Government's proof of existence of the conspiracy charged, as set forth in the Statement (Br. 5-19), is clear and compelling. The Government adroitly avoids any reference to *Glasser* v. *United States,* 315 U. S. 60, wherein this Court held that admissions of statements by conspirators in the absence of another co-conspirator cannot be used to establish a conspiracy until there is proof aliunde of the existence of conspiracy. All the evidence set forth in the respondent's Statement (Br. 5-19) pertained to alleged overt acts, done in pursuance of conspiracy, and after it was charged to have been formed. The Trial Court found that each and every of the overt acts in respondent's Statement was legal in and of itself.

The Government, by failing to point out any independent evidence in this Record to establish the conspiracy or to establish the petitioners' connection with it other than through admittedly legal overt acts, admits that no such independent evidence is to be found in the Record.

VI.

That the respondent, in its Brief (Br. 32), misstates the position of the dissenting Judge in the lower Court. The Government stated that none of the other contentions made by the petitioners "was found meritorious by the dissenting Judge, whose opinion was based entirely on what he thought were defects in the indictment." (R. 176) This is a misstatement of the fact, for the reason that Judge Stephens, the dissenting Judge, did not even consider these points, as his decision held the indictment and the convic-

tions thereon invalid and, therefore, he did not believe it necessary to consider the other points raised. As stated by Judge Stephens:

> "The defects which I think exist in the indictment are obviously of substantial character and cannot therefore be disregarded under 18 U.S.C. § 556 (1940) or Rule 52(a), Federal Rules of Criminal Procedure. A precedent supporting an indictment with such substantial defects should I think not be set."

CONCLUSION.

WHEREFORE, upon the foregoing grounds, the petitioners respectfully pray that this Petition for Rehearing be granted, and that the orders heretofore entered by this Court on October 10, 1949 denying their Petitions for Writs of Certiorari to the Court of Appeals for the District of Columbia, be reversed.

Respectfully submitted,

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Certificate of Counsel

We, SAMUEL GOLDSTEIN, attorney for Petitioners, and PERRY W. HOWARD, of counsel for Petitioner Murray W. Garsson, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and further, that the Petition is restricted to the grounds specified in Amended Rule 33(2) of the Rules of the United States Supreme Court.

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